IN THE

Supreme Court of the United States

No. 201

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

Supreme Court of the United States

TERM,

No. .....

CENTRAL ICE CREAM COMPANY, a corporation,
Petitioner,

vs.

GOLDENROD ICE CREAM COMPANY, a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

THE OPINIONS BELOW.

The opinion of the Court of Appeals for the Seventh Circuit of which review is sought in this case is reported as *Central Ice Cream Co. v. Goldenrod Ice Cream Co.*, 287 Fed. 2d 265. That opinion is reprinted as Appendix VI to this Petition, p. liii.

That opinion affirmed a judgment of the District Court for the Northern District of Illinois, Eastern Division that

is reported as *Central Ice Cream Co. v. Golden Rod Ice Cream Co.*, 184 F Supp. 312. That opinion is reprinted as Appendix III to this Petition, pp. v to xix.

The opinion of the District Court cited above was pronounced on reversal and remanded by the Court of Appeals in *Central Ice Cream Co. v. Golden Rod Ice Cream Co.*, 257 Fed. 2d 417. That opinion is reprinted as Appendix I to this Petition, pp. i to ii.

The District Court's original opinion in this court is reported as *Central Ice Cream Co. v. Golden Rod Ice Cream Co.*, 153 Fed. Supp. 684. That opinion is reprinted in full as Appendix VII, pp. lvii to lx.

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The Date of the Judgment Sought to Be Reviewed and the Time of Its Entry.

The date of the judgment sought to be reviewed and the time of its entry is February 8, 1961.

The Date of the Denial of Petitioner's Petition for Rehearing.

Petitioner's petition for rehearing was denied on April 5, 1961.

The Statutory Provision Conferring on This Court Jurisdiction to Review the Judgment in Question.

This Court's jurisdiction to review the judgment in question is conferred by Section 1254 of the Judicial Code (28 U. S. C. 1254).

THE QUESTIONS PRESENTED FOR REVIEW.

All of the questions presented for review arise upon facts stipulated by the parties in the District Court (*Stipulation of Facts*, App. IV, pp. xxiii to li).

Those questions are:

> 1. RESPONDENT, A MANUFACTURER AND WHOLESALER OF ICE CREAM MADE 101 SALES OF ITS ICE CREAM TO CUSTOMERS OF PETITIONER, A COMPETITOR, UPON TERMS THAT WERE PREFERENTIAL AND DISCRIMINATORY AND FOR THE PURPOSE OF DIVERTING THOSE CUSTOMERS FROM PETITIONER TO RESPONDENT.
>
> RESPONDENT'S ICE CREAM IS MANUFACTURED WHOLLY IN ILLINOIS AND IS SOLD DIRECTLY IN THAT STATE ONLY.
>
> BUT IT IS MADE IN VERY SUBSTANTIAL PART FROM MILK AND OTHER INGREDIENTS THAT ARE IMPORTED INTO ILLINOIS IN INTERSTATE COMMERCE.
>
> RESPONDENT MAKES NO CLAIM THAT THE DISCRIMINATION IN PRICE WAS JUSTIFIED BY LOWERED COSTS.
>
> WERE THESE 101 SALES OF RESPONDENT'S ICE CREAM MADE IN INTERSTATE COMMERCE OR WHOLLY IN INTRASTATE COMMERCE WITHIN THE MEANING OF THE CLAYTON ACT AS AMENDED BY THE ROBINSON-PATMAN ACT?

If the answer to the question stated above is "Yes, the 101 sales were made in interstate commerce because, as petitioner contends, respondent's ice cream, although manufactured and directly sold only in Illinois, represented the continuous interstate flow of milk and ingredients blended into the finished product," the court need not consider the questions stated below.

> 2. IF THE FACTS STATED IN QUESTION 1 ARE NOT OF THEMSELVES SUFFICIENT TO CONSTITUTE A VIOLATION OF THE CLAYTON ACT AS AMENDED BY THE ROBINSON-PATMAN ACT, DO THE ADDITIONAL FACTS THAT
>
> (1) RESPONDENT SOLD IN ILLINOIS ICE CREAM OF SUPERIOR GRADE AND QUALITY TO A CORPORATION THAT IN TURN REGULARLY RESOLD A PORTION OF THAT ICE CREAM TO THE SANTA FE RAILROAD FOR TRANSIT AND CONSUMPTION IN INTERSTATE COMMERCE AND
>
> (2) THE FACT THAT PETITIONER MAKES INTERSTATE SALES AND DELIVERIES OF ITS ICE CREAM
>
> RENDER RESPONDENT'S 101 DISCRIMINATORY SALES VIOLATIONS OF THE CLAYTON ACT?

But should this Court answer each of the questions stated above,

> "No, respondent's sales do not on the facts stated in those questions, standing alone, violate the Clayton Act, with or without recourse to the Robinson-Patman amendment thereto"

then the following question is presented.

3. RESPONDENT STIPULATED THAT BOTH PETITIONER AND RESPONDENT, WITH SOME 23 OTHER WHOLESALERS OF ICE CREAM IN THE CHICAGO AREA WERE COMPETITIVE BIDDERS FOR THE CHICAGO SCHOOL BOARD'S CONTRACT FOR THE SALE OF ALL OF CHICAGO'S REQUIREMENTS FOR ITS PUBLIC SCHOOL LUNCH PROGRAM.

RESPONDENT HAS STIPULATED THAT ITS VICE PRESIDENT TOLD PETITIONER'S VICE PRESIDENT THAT IF PETITIONER BID IN COMPETITION WITH RESPONDENT FOR THIS CONTRACT AND "IF WE LOSE THAT [CHICAGO SCHOOL BOARD] BUSINESS, WE ARE CERTAINLY GOING TO HAVE TO MAKE AN EFFORT TO FILL THAT GAP."

DESPITE THIS MINATORY STATEMENT, PETITIONER SUCCESSFULLY BID AGAINST RESPONDENT FOR THE CHICAGO SCHOOL BOARD CONTRACT FOR THE YEAR 1956.

IMMEDIATELY THEREUPON PETITIONER MADE THE 101 DISCRIMINATORY SALES MANIFESTLY IN RETALIATION FOR THIS BID AND TO SUPPRESS FUTURE COMPETITIVE BIDDING IN AN UNPRECEDENTLY INTENSIVE CAMPAIGN OF SALES DURING 55 DAYS.

DO THESE ADMITTED ACTS, COUPLED WITH THEIR MANIFEST INTENT TO INHIBIT FUTURE COMPETITIVE BIDS ON A LARGE ANNUAL PUBLIC CONTRACT, RENDER THEM DISCRIMINATORY SALES VIOLATIONS OF THE CLAYTON ACT?

THE STATUTE INVOLVED.

The statutory provision involved is Section 2 of the Clayton Act, as amended by Section 1 of the Robinson-Patman Act, Title 15, U. S. C., Sec. 13(a) (F).

The relevant text is as follows:

Section 2 of the Clayton Act, as amended by Section 1 of the Robinson-Patman Act, Title 15 U. S. C., Section 13(a)-(f) provides as follows:

> "(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, which it finds that available purchasers in greater quantities are so few as to render differentials on account thereof un-

justly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established; And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party

to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

STATEMENT OF THE CASE.

All of the facts in this case were stipulated by the parties in the District Court (Stipulation of Facts, App. IV, *post*, pp. xxiii to lii). The facts relied on by petitioner for

reversal of the judgment below, stated in chronological order, with references either to the District Court's findings of fact or to the stipulation, are as follows:

Petitioner and respondent are rivals in the highly competitive business of manufacturing and selling ice cream (and other frozen confections not directly involved in this case) to retail distributors in the Chicago area.

It is a common practice in the dairy industry to compute the amount of milk in pounds of butter fat content rather than in terms of gallons or pounds of whole milk. The parties have observed this practice throughout this case.

The District Court found:

> "Plaintiff used .0322% of the butter fat reaching the Chicago Milk Marketing Area in 1955, and used 5.318% of the total butter fat used in the production of ice cream by *all* ice cream handlers in the Chicago Marketing Area in 1955". (Trial Court's Memorandum, Tr. 54-55, App. IV, pp. ix-x, *post.*) "In 1955 defendant used .01452% of the butter fat reaching the Chicago Milk Marketing Area from Illinois and Wisconsin, and 7.468% of the total butter fat used in the production of ice cream by *all* ice cream handlers in the Chicago Marketing Area." (Tr. 54-55, App. IV, pp. x, *post.*) Thus the petitioner and the respondent used between them 12.786%, or a little more than *one eighth*, of all butter fat content of milk that was used in the Chicago Milk Marketing Area in the year 1955 for the manufacture of ice cream and other frozen desserts.
>
> In the year 1955 both parties sold milk by intrastate deliveries to retailers to their place of business here in Illinois. In addition, the petitioner sold and directly delivered .025% of its ice cream to retailers in Indiana." (App. II, pp. .... to ...., *post.*)

Although respondent manufactured its ice cream from ingredients imported in substantial part from Wisconsin

and other states, it made no *direct* interstate deliveries of ice cream to anyone in 1955.

But respondent did sell and deliver ice cream to Fred Harvey, a New Jersey corporation, and of this ice cream sold to Harvey, a "small portion" was "subsequently resold by Fred Harvey to the Atchison, Topeka and Santa Fe Railroad Company" and was "used in the dining cars of that railroad company traveling between Chicago and the Pacific Coast."

Petitioner sold a portion of its ice cream, very small in percentage but substantial in volume, by directly delivering that ice cream to customers in Michigan.

Aptly stating the pith and marrow of the facts upon which the petitioner relies for recovery, the District Court's memorandum recites (emphasis ours) (App. III, pp. vi):

> "For many years prior to November 5, 1955, defendant had sold and supplied ice cream to public authorities and agencies in Illinois, one of which was the Board of Education of the City of Chicago, which purchased the products for re-sale to school children. In 1955 plaintiff intended to submit a bid to the Board of Education of the City of Chicago for the sale of ice cream for its school lunch program. On November 3, 1955, the following conversation took place between Philip Sang, then defendant's Vice-President, and Thomas N. Cummings, plaintiff's Vice President in 1955:
>
> 'Tom, who was leaving his car there was—after some fifteen minutes of conversation, Tom just about as he was to take leave of me said, "Phil, how long have you served the schools?"
>
> 'I said, "Some twenty odd years, Tom. Why, are you thinking about bidding?"
>
> 'He said, "I don't know."
>
> 'I said, "*Well, Tom, you know if we lose that business we are certainly going to have to make an effort to fill the gap.*"

'And with that, Tom took leave and I drove on back to the plant.'

"Subsequently, plaintiff did submit its bid to the Chicago Board of Education and the bid was accepted. *In the six or seven weeks following November 4, 1955, the defendant's salesmen called on plaintiff's customers in the Chicago area within the State of Illinois, and not elsewhere, soliciting their ice cream business, and in many instances made loans of money to said customers by way of advanced discounts in order to procure their business.* Such loans were represented by customers' notes payable to defendant, and in most instances were to be amortized or repaid out of a special discount, usually at the rate of ten cents per gallon, to be allowed such customers upon their purchases of ice cream from the defendant. Such loans were not uniform in amount, but were based upon the defendant company's estimate of the potential volume of business to be procured from each of said customers. *Defendant did not at that time make or offer to make similar advances of money to all of its then customers in the Chicago area, but 'such advances or loans were made to meet competition from the plaintiff and other purveyors of ice cream in the Chicago area'.*

"A total of 101 customers of plaintiff, all located within the Chicago area within the State of Illinois, subsequently became customers of the defendant. Their names, the advances made by defendant and the security for these advances are recited in Exhibit 1 to the Stipulation. The total of such advances is $13,730.00, plus, in one instance, the loan of two air conditioners to a customer of plaintiff." (Tr. 55-56, App. IV, pp. x-xii, *post.*)

For diametrically opposite reasons, both petitioner and respondent heavily rely upon the following language from the trial court's finding (App. III, p. viii.):

"Competition for ice cream business in Chicago has been for many years and is now very intense. Retailers

with any considerable volume or potential volume of retail sales **bargain extensively with manufacturers for financial help in the way of loans or special price concessions. Manufacturers have and do make loans or give special prices or special discounts to retailers to procure or hold their business. All of the larger ice cream manufacturers periodically publish price lists and such published prices are fairly comparable.**"

Both parties rely, again for diametrically opposite reasons, upon the undisputed finding by the trial court (emphasis supplied) (App. III, p. xx):

> "It is a uniform practice in the Chicago area for manufacturers of ice cream to furnish retailers with mechanically refrigerated cabinets for the storage of ice cream in their retail stores. When a retailer changes from one manufacturer and becomes a customer of another, the manufacturer taking over the service removes the original vendor's cabinets and equipment and returns the same to the owner. **It has been a general practice in the industry to allow retailers who purchase their own storage cabinets a discount of 10c a gallon off the published list prices in consideration of that fact. Both the plaintiff and the defendant have, with other competitors, followed said practice and have felt compelled to do so to meet competition in the area.**"

Petitioner does not deny that on many occasions it has made preferential and discriminatory sales of exactly the kind that it says are illegal.

Petitioner's position is that its past violations of the act are no defense to respondent's offense against the same act.

Petitioner brought this suit in equity for injunction in the United States District Court for the Northern District of Illinois. It originally based its charges of a violation of the Federal Anti Trust Laws on both the Sherman Act (15 U. S. C. § 1) the Clayton Act (15 U. S. C., § 13), the Robinson-Patman Amendment of the Clayton Act (15 U. S. C. §§ 13 and 13(b)).[1]

The District Court dismissed petitioner's complaint upon the respondent's motion, which asserted that the complaint stated no case for which relief might be granted. *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 153 Fed. Supp. 684 (App. VII, pp. lvii to lx).

The Court of Appeals reversed, *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 257 Fed. 2d 417 (App. I, *post*, pp. i to ii). That court said in its opinion (257 Fed. 2d at page 418, App. p. . . .):

> "There are allegations about defendant's discriminatory and unlawful methods of competition which, conclusions of the pleader aside, manifest enough to war-

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[1] For completeness in narration we make note that petitioner also charged a violation of Illinois anti-monopoly law, asserting this charge as a "pendent case" arising upon the same facts that gave incidence to petitioner's invocation of the Federal Anti Trust Laws. It has now abandoned its claim under state law. At the time the original complaint was filed, petitioner's counsel believed in good faith that Federal funds were used to augment the Chicago School Board's purchase of ice cream. It, therefore, asserted that the right of a United States citizen, natural or corporate, to bid on a contract for *Federal* funds was a right arising under the laws of the United States and that a conspiracy to interfere with that right was, like a conspiracy to interfere with the right to vote for United States Senator or Congressman, a violation of the Federal Civil Rights Act even though no public officials were charged as conspirators. Upon learning that the Chicago School Board does not use any of its Federal funds to pay for ice cream, petitioner promptly conceded there was no factual basis for its claim that it had been denied a right secured by the Federal Constitution to bid competitively for Federal public funds.

rant an assumption on our part they existed. What impact, if any, on interstate commerce there was is now a matter of proof, and *Moore* v. *Mead's Fine Bread Co.*, 1954, 348 U. S. 115, 75 S. Ct. 148, 99 L. Ed. 145, warrants letting this complaint survive defendant's motion.

The case is reversed and remanded to the district court with directions to overrule the motion to dismiss the complaint."

On remandment the parties entered into the stipulation of facts that has been summarized above.

The facts recited in the parties' stipulation which, of course, superseded the allegations in the plaintiff's original complaint, differed from those alleged in the complaint only in that (1) the complaint did not allege that the ice cream manufactured by respondent and sold to the Harvey Restaurants was of a higher and special quality than that sold to petitioner's customers and (2) the complaint, through mistake of petitioner's counsel, erroneously alleged that Harvey Restaurants directly operated the Santa Fe's dining car service as a concession, whereas the fact disclosed by the stipulation was that the Harvey Restaurants resold respondent's ice cream to the Santa Fe for transit and consumption in dining cars between Chicago and California.

The District Court made findings of fact (App. III, pp. vi to xix, *post*) that summarized those recited by the stipulation of the parties.

The District Court, deciding this case upon the stipulated facts distilled the essential substance of those facts as its findings.

The District Court reached and declared the conclusions of law that are challenged here. Those conclusions appear in the district court's memorandum, findings of fact and judgment (App. III, pp. xi to xix).

Briefly summarized, those conclusions are:

> The fact that the defendant manufactures its ice cream in substantial part from milk and other ingredients imported into Illinois in interstate commerce, sells the ice cream embodying these imported ingredients to Illinois retailers and sells a portion of that ice cream to Harvey restaurants which resale by Harvey to the Santa Fe Railroad, in whose dining cars the ice cream is travelled and is consumed in interstate commerce, does not render the defendant "engaged in commerce" within the meaning of the Clayton Act as amended by the Robinson-Patman Act.
>
> Even if the defendant is engaged in interstate commerce because it sells a small part of its ice cream to Harvey for resale to the Santa Fe Railroad Company, the allegedly discriminatory sales involved in this case were not made in that commerce because the transformation of imported ingredients into the finished product abrupted the flow of interstate commerce and the sales of the finished product, which was manufactured in Illinois, were not effected by interstate deliveries.
>
> In any event, the district court holds as a matter of law that since the preferential terms granted by the defendant to the plaintiff's customers were of a kind that have long been common in the industry, the plaintiff itself having made similar sales, those sales are not "discriminatory" within the purview of the Clayton Act.

For these reasons, the District Court dismissed the plaintiff's suit.

Petitioner accepts the facts as declared by the District Court. Those findings are in substance the same as those narrated above. Indeed, the facts that we deem crucial in this Statement of the Case have been quoted *verbatim*

from the District Court's Memorandum, Findings of Fact and Conclusions. (App. III, pp. v to xix, *post.*)

The Court of Appeals for the Seventh Circuit affirmed the District Court's judgment.

The Decision of the Court of Appeals.

The only question decided by the Court of Appeals was the question whether the defendant's preferential sales to the plaintiff's 101 customers were made in commerce.

The Court of Appeals reasoned that since the sales of the finished product were effected by wholly local deliveries, those sales were not made in interstate commerce even though the ice cream thus locally sold by the defendant embodied in very substantial part ingredients imported into Illinois in interstate commerce.

The Court of Appeals in effect held that the transmutation of these imported ingredients, together with ingredients of wholly interstate origin, into ice cream abrupted the flow of interstate commerce and immunized these sales against the Clayton Act.

The Court of Appeals did not mention the admitted fact that these 101 sales were made in manifest retaliation for the plaintiff's having bid competitively for the Chicago School Board's lunch contract.

Of the cases relied upon by petitioner, the Court of Appeals mentions and would distinguish only *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115, *Klor's, Inc.* v. *Broadway Hale Stores, Inc.*, 359 U. S. 207, and *United States* v. *Employing Plasterers Association*, 348 U. S. 186.

The Court of Appeals did not mention the other cases relied upon by petitioner and discussed under Reasons Relied Upon For The Allowance Of The Writ of Certiorari, *post.*

Upon petition for rehearing, petitioner cited *Radiant Burners, Inc.* v. *Peoples Gas Co.*, 364 U. S. 656, not available when this case was submitted for oral argument.

Petition for rehearing was denied without further opinion.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI.

I.

ALL OF THE QUESTIONS PRESENTED BY THIS CASE ARE OF SUFFICIENT NATIONAL MOMENT TO ELICIT THIS COURT'S WRIT OF CERTIORARI.

For the moment we ask the court's attention only to Chicago and its environs and only to the ice cream business in that highly metropolitan area.

At least twenty-three principal dairy and other companies, some of which are very much larger than petitioner and respondent would be if petitioner and respondent were merged and some of which are smaller, purchase billions of pounds of whole milk. (In 1955 the total poundage was over 44,000,000,000, the butter fat poundage of this quantity was over 158,500,000.)

A very large but undetermined proportion of this milk comes to Chicago in interstate commerce, principally from Wisconsin's dairy farms.[1]

Chicago's larger dairies and all of her manufacturers of ice cream import very substantial quantities of other ingredients of the finished confection, notably sugar, vanilla and other flavoring extracts, in interstate commerce.

All of Chicago's manufacturers of ice cream, including petitioner and respondent, fuse a fraction of the whole milk and these ingredients into ice cream.

All of Chicago's manufacturers of ice cream, including both petitioner and respondent, make sales of this ice cream, which represents a blending of ingredients of purely intra-

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[1] It is not possible to trace imported milk into ice cream because milk is fungible. Imported and domestic milk often are intermixed before they are sold to dairies, bakers, makers of ice cream and other confections.

This fusion of intrastate and local milk only serves to emphasize the intimacy of interstate and intrastate commerce in the dairy, ice cream and confection industry.

state origin with those imported from other states, in sales that are *purely local* in that the orders are solicited and accepted, the deliveries are made and payment is remitted and received entirely within Illinois.

Of course, the interstate and intrastate aspects of the ice cream industry are similar in every large metropolitan center.

Moreover, it is not only ice cream alone, nor is it only dairy products alone that are manufactured in part from ingredients that are raised, mined, quarried or otherwise produced wholly within the state and in part from imported concomitants.

Against this panorama in which the streams of interstate and intrastate commerce meet in confluence to form finished products, ice cream for the Chicago area in the instant case, the District Court found (*Memorandum, Findings and Judgment*, App. III, pp. vii to . . .):

> "Competition for ice cream business in Chicago has been for many years and is now very intense. Retailers with any considerable volume or potential volume of retail sales bargain extensively with manufacturers for financial help in the way of loans or special price concessions. Manufacturers have and do make loans or give special prices or special discounts to retailers to procure or hold their business. All of the larger ice cream manufacturers periodically publish price lists and such published prices are fairly comparable."

The court further describes the economic warfare, App. III, p. ix):

> "It has been a general practice in the industry to allow retailers who purchase their own storage cabinets a discount of 10c a gallon off the published list prices in consideration of that fact. Both the plaintiff and the defendant have, with other competitors, followed said practice and have felt compelled to do so to meet competition in the area."

Thus, it appears that Chicago's industry is rife with strife. It is an industry characterized by forays upon the part of one manufacturer against another, the rivals offering and their retailer customers demanding, in the language of the trial court quoted above, "loans" and "special prices or special discounts". These "loans" or "special discounts" are made, so the District Court found on stipulated facts, not only to "hold" but to "procure" the "business" of the retailers.

> Moreover, there is no claim and no pretense that the "general practice in the industry to allow retailers who purchase their own storage cabinets a discount of 10c a gallon off the published list prices in consideration of that fact"

is, in the language of the Robinson-Patman amendment to the Clayton Act (U. S. C., Title 15, § 13(b)), justified by any showing that these

> "list price(s) or the furnishing of [these preferential] services or facilities"

are made

> "in good faith to meet [not to underent] an equally low [not a higher] price of a competitor." (Emphasis and matter in brackets supplied.)

The question whether (1) the fusing of ingredients of intrastate origin with those imported in interstate commerce into ice cream, (2) the sale of this ice cream, which represents a blend of interstate and intrastate ingredients in local sales at (3) discriminatory prices and upon preferential terms violates the Clayton Act, with or without the Robinson-Patman amendment to that Act, *per se*, and without more, is substantial in the light of this Court's decisions in *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115, *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 347 U. S. 186,

United States v. *Employing Plasterers Association*, 348 U. S. 186 and *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 31, all of which declare that *wholly interstate* sales are within "interstate commerce" under the anti trust laws if those sales occur at the beginning or at the end as well as in the middle course of the flow of interstate commerce, *Klor's, Inc.* v. *Broadway Hale Stores*, 359 U. S. 207, *Radovich* v. *National Football League*, 352 U. S. 445 and *Radiant Burners, Inc.* v. *Peoples Gas Co.*, ... U. S., holding that *no public injury* need be shown to establish a violation of the anti-trust laws under the Sherman Act (the *Klor's* case and the *Radiant Burners* case) *or the Clayton Act* with or without the Robinson-Patman amendment (the *Radovich* case).

II.

RESPONDENT'S PREDATORY SALES WERE MADE IN INTERSTATE COMMERCE. THEY HAVE NOT BEEN JUSTIFIED BY ANY BASIS IN COST DIFFERENTIALS. THEREFORE THOSE SALES VIOLATED THE CLAYTON AND THE ROBINSON-PATMAN ACTS.

Under Point III of these Reasons Relied Upon For the *Writ of Certiorari, post*, we emphasize the fact that respondent's 101 discriminatory sales to petitioner's customers were made in a concentrated onslaught upon petitioner's trade outlets between November 5 and December 31 of 1955, a period of 52 calendar days. They were made in consummation of respondent's threat that if petitioner should bid in competition with respondent for the very large contract with the Chicago Public School Board for ice cream, which contract respondent had held for 20 years.

Respondent's manifest purpose was to menace petitioner and all of its other competitors with reprisal if any of them bid successfully against petitioner for the Chicago School Board's very large public contract.

We urge under Point III that for this reason alone, respondent's predatory raids upon petitioner's trade tended to achieve a monopoly and to restrain competition and therefore violated the Clayton Act.

But under this Point we ignore all reference to the Chicago School Board's lunch program. We argue that the 101 discriminatory sales were made in interstate commerce and violated the Clayton Act, with or without recourse to the Robinson-Patman Act, *per se*, and as a matter of anti-trust law.

A.

Since respondent's ice cream embodied a substantial proportion of ingredients imported into Illinois in interstate commerce, respondent's 101 sales of that ice cream were made in "interstate commerce" as a matter of statutory anti-trust law.

Petitioner places chief reliance for *certiorari* and reversal of the Court of Appeals on

Moore v. Mead's Fine Bread Co., 348 U. S. 115.

In the *Moore* case, the plaintiff, Moore, operated a bakery in Santa Rosa, New Mexico, selling his bread to *purely local* retailers by *purely local* deliveries and collections.

The respondent in that case, *Mead's Fine Bread Co.*, manufactured bread in New Mexico, and sold that bread in New Mexico.

Moore, believing that Santa Rosa's retailers would not support a market for two rival bakeries, organized a boycott against Meade. Meade retaliated by quoting preferentially low prices to Santa Rosa grocers only, selling its bread at higher prices elsewhere in New Mexico.

Because of the importance of the *Moore* case, we have had recourse, not only to this court's opinion in that case and the two opinions of the Court of Appeals for the 10th Circuit,[1] but to the transcripts and the briefs in this court in that case.

From this court's opinion, standing alone, it appears that Mead made some direct sales in Texas by delivering its bread across the State line. In this case, respondent sold ice cream, although of a higher quality than that which it sold in competition with petitioner, to the Harvey restaurants for consumption in interstate commerce. However, and this fact does *not* appear in this court's opinion in the *Moore* case but does appear from excerpts from the record in that case cited in the margin, *during a period of time from January 16, 1948, the approximate date of the inception of the price war between Moore and Mead, until December 27, 1948, Mead sold* **not a single loaf of bread** *anywhere except in New Mexico.*[2]

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[1] *Moore* v. *Mead's Fine Bread Co.*, 10th Cir., 184 Fed. (2d) reversed *per curiam*, 340 U. S. 944, reconsidered on reversal, 208 Fed. (2d) 77, reversed again, 348 U. S. 115.

[2] The transcript of the *Moore* case, 348 U. S. 115, October Term, 1954, No. 121 discloses the following stipulated facts:

The following passage appears at page 132 of the transcript:

> Members of the Jury, it has been agreed by counsel, and you may consider it as evidence in the case, that the defendants operated on a regular schedule a bread route from Clovis, New Mexico, a delivery, from September 18, 1946, until January 16, 1948. At that time it was discontinued. And began again on December 27, 1948, and continued until the latter part of 1951. That agreement you may consider as evidence in the case.
>
> (Off the record.)

The evidence showed without contradiction that the defendant first started to transport its bakery products from its only bakery in Clovis, New Mexico to Santa Rosa, New Mexico on an unknown date in January of 1948.

Moore, the plaintiff, was asked, 'Now, do you know when the defendant started bringing bread into Santa Rosa, New Mexico?" and answered, "Yes, sir." Asked, "When was that?", he answered, "January of 1948"

It appears in part from the court's opinion in the *Moore* case, 348 U. S. 115, and in part from the excerpts from the transcript cited in the margin[3] that Mead relied upon the

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without specifying any date. This evidence, given by the plaintiff, was not only uncontradicted but was relied upon by the defendant as fixing the approximate time of the defendant's entry into competition with the plaintiff for the trade of customers in Santa Rosa, New Mexico.

In other words, from the stipulation quoted above, it was *uncontradicted* that there was no competition whatever between Moore and Mead Company until an unknown date in January of 1948, that, as the opinions of the Supreme Court of the United States in the *Moore* case and of this court in the instant case, reflect, Moore's business was always wholly local, that the defendant (Mead) *made no interstate sales whatever of any kind* from January 16, 1948, which would be the approximate but unknown date of the inception of competition between the plaintiff and the defendant, until December 27, 1948, when it resumed sales in Farwell, Texas, and continued those sales "until the winter of 1951".

The "boycott" initiated by the plaintiff, which provoked the retaliatory sales, began on September 3, 1948.

The plaintiff himself, who organized the boycott, was asked, "What day was the boycott against Mead's to become effective?" and answered, "September 3rd" (R. 90), referring to the year 1948.

[3] The defendant in the *Moore* case argued to the Supreme Court of the United States, much as the defendant in this case has argued to the District Court and to this court, that even if there was actionable discrimination under the Clayton Act after *December 27, 1948*, on which date the defendant first began to make interstate sales in Farwell, Texas, at prices higher than it charged the plaintiff's former customers in Santa Rosa, New Mexico, there could not possibly be any discrimination between interstate and intrastate sales prior to December 27, 1948, because the defendant had made *no* interstate sales whatever of *any* bakery goods at *any* price since the preceding January, seven months before the first sale complained of and the plaintiff did not even claim that any local sales were made in Santa Rosa until September 3rd of 1948. Mead made no more interstate sales until December.

The defendant made this argument beginning at page 25 of its brief. Since it is not our purpose to argue the *Moore* case, we merely quote the heading of that argument (brief of defendant in the *Moore* case, page 25):

> "3. The sales in Santa Rosa and the belated sales in Farwell, Texas were not so related or connected that one could affect the other."

Although the Supreme Court of the United States was thus importuned to hold, as this court's presently standing opinion reads the opinion in the *Moore* case as holding (folio 3), that "at least one of the purchasers 'involved in such discrimination' by a purchase in interstate commerce" the Supreme Court of the United States with measured deliberation refused so to hold at all.

fact that for almost a year, it made *no* interstate sales of *any kind*, precisely as the instant respondent relies upon the fact that it did not itself sell any of its ice cream by interstate deliveries. But Mr. Justice Black, speaking for a unanimous court, said at pages 118, 119:

> "If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price war was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants."

Because Mead Fine Bread Co. was affiliated with other companies that did an interstate business and itself directly sold bread in Texas during a part *but not all* of the period with respect to which damages were awarded, Mr. Justice Black did say, and in the instant case the Court of Appeals

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Moreover, as the record in the *Moore* case quoted above shows, Moore relied not only upon sales made after December 27, 1948 by the defendant in Farwell, Texas, which sales were indeed involved in the discrimination, but also upon sales made in the period *ending* on January 16, 1948, more than seven months before Moore made *any sales*, discriminatory or nondiscriminatory, of any bread in or near Santa Rosa, New Mexico.

It is thus clear that Moore relied upon Mead's sales in Texas merely to show that Mead was engaged in interstate commerce and not to show a discrimination apparent from a comparison of Mead's prices in Texas and his prices in Santa Rosa.

Thus, Mead's interstate sales were relied upon by the Supreme Court of the United States, not as being "involved in the discrimination" but merely as showing that "the treasury used to finance the warfare" was "drawn from interstate, as well as local sources." Just as the plaintiff has shown in this case that Goldenrod's sales to Harvey engage Goldenrod in interstate commerce even though the sales to Harvey are not discriminatory. Had this not been the *sole* purpose of advertence to Mead's sales in Texas, there would have been no reason for Moore to rely upon sales made seven months before the boycott and price war or for Mead to argue that its price cutting did not violate the Clayton Act until it resumed interstate sales in December of 1948.

It is thus clear that the *Moore* case does support the plaintiff and does not support the defendant, the district court or the presently standing opinion of this court.

relied upon the language quoted immediately below to distinguish the *Moore* case from the instant case, at pages 118, 119:

> "We have here an interstate industry increasing its domain through outlawed competitive practices. The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only respondent but also a group of interlocked companies engaged in the same line of business; and the prices on the interstate sales, both by respondent and by other Mead companies, are kept high while the local prices are lowered."

But, in the first place, the excerpts from the transcript of the record in the *Moore* case already cited in notes 2 and 3, *ante*, make it clear that during much of the period of the Moore-Mead price war, Mead made *no sales outside of New Mexico*.

In the second place, the respondent in the instant case, Goldenrod Ice Cream Company, did draw upon the arteries of interstate commerce to finance its raids upon petitioner not only for the ingredients for its ice cream but from the sale thereof on Santa Fe dining cars between Chicago and California.

Petitioner does not contend that respondent's sales made to its customers were discriminatively favorable in their terms in comparison with those made to the Harvey restaurants, for the ice cream sold to Harvey was of a higher grade and quality than that which respondent sold locally.

But petitioner does rely upon the sales to Harvey restaurants as conclusive proof that respondent was

> "the beneficiary of interstate business"

and drew upon a

> "treasury used to finance the warfare [with petitioner] from interstate, as well as local, sources."

The District Court and the Court of Appeals acceded to respondent's contention that the fusing of ingredients of local and extrastate origin into the finished product, ice cream, in some way abrupted the "continuous flow" of interstate commerce, wherefore, so the lower courts held, since respondent's ice cream was manufactured and the discriminatory sales were made entirely in intrastate commerce these sales were not "made in interstate commerce."

But all of this court's most nearly pertinent decisions declare that the transformation of ingredients into finished product, whether the transformation occurs before the inception or after the termination of the product, interstate transit does *not* abrupt the continual flow of interstate commence.

This court's signal decisions in this area all hold that neither the breaking or division of bulk imports into smaller quantities, nor the transmutation of ingredients into finished products for intrastate sale stops the continual flow of interstate commerce despite changes in the quantity for transmutation of the commodities moving from States of origin to States of ultimate consumption.

The most clearly controlled cases are *Standard Oil Co. v. Federal Trade Commission*, 340 U. S. 231; *United States v. Employing Plasterers Association*, 347 U. S. 186.

Standard Oil Co. v. Federal Trade Commission, 340 U. S. 231.

In *Standard Oil Co. v. Federal Trade Commission*, 340 U. S. 231, Standard Oil Co. was charged before the Federal Trade Commission with a violation of the Clayton Act, not the Sherman Act, because having imported gasoline from Indiana into Michigan in large bulk quantities and having stored that gasoline in huge tanks it divided the gasoline

into smaller quantities by pumping it into trucks for sale to local filling stations and garages.

It made its prices charged in these *purely local sales* more preferential and discriminatory.

Standard Oil Co. contends that the sales having been made in local commerce, they could not violate the Clayton Act, with or without recourse to the Robinson-Patman Act.

This court held the contrary.

Of course Standard Oil Co. was engaged generally in interstate commerce. But this court held that these particular sales were made in the course of interstate commerce. This court held (340 U. S. at pp. 241 and 242) "that the Clayton Act as amended by the Robinson-Patman Act permitted 'a price reduction made to **meet** in good faith an **equally low**-price of a competitor's but that it **excluded** reductions that **"undercut"** a competitor.'"

But if it be said, as respondent will say, that in the *Standard Oil Co.* case, only the quantities of gasoline, not the form thereof, were reduced from quantities stored in bulk to smaller lots sold to dealers, whereas in this case the ingredients (including sugar) were transformed into ice cream, we rely upon

Mandeville Island Farms v. American Crystal Sugar Co., 347 U. S. 186.

In the *Mandeville Island Farms* case the plaintiffs were growers of sugar beets in California. They sold their beets to the defendants in California. The defendants manufactured sugar from the beets in California but subsequently sold the same in interstate commerce.

The lower courts held that the manufacture of sugar prevented the application of the Sherman Act since it was the sugar, not the beets, that was the commodity sold in interstate commerce.

But this court, reversing and speaking through Mr. Justice Rutledge, said at page 229:

> "The artificial and mechanical separation of 'production' and 'manufacturing' from 'commerce', without regard to their economic continuity, the effects of the former two upon the latter, and the varying methods by which the several processes are organized, related and carried on in different industries or indeed within a single industry, no longer suffice to put either production or manufacturing and refining processes beyond reach of Congress' authority or of the statute."

United States v. Employing Plasterers Association, 347 U. S. 186.

In the *Employing Plasterers* case, cited above, the District Court for the Northern District of Illinois and the Court of Appeals for the 7th Circuit dismissed a suit by the United States under Section 1 of the Sherman Act, holding that although the allegations of the complaint charged "a restraint of trade and monopoly" the restraint of trade and monopoly were immune to that Act because they were "wholly local".

This Court reversed.

Stating the essence of the facts, Mr. Justice Black, speaking for the Court, said (pp. 187-188):

> "In summary the Government's complaint alleges: Defendants are (1) a Chicago trade association of plastering contractors; (2) a local labor union of plasterers and their apprentices; (3) the union's president. These contractors and union members employed by them do approximately 60% of the plastering contracting business in the Chicago area of Illinois. Materials used in the plastering, such as gypsum, lath, cement, lime, etc., are furnished by the contractors. Sub-

stantial quantities of this material are produced in other states, bought by Illinois building materials dealers and shipped into Illinois, sometimes going directly to the place of business of the dealers and sometimes directly to job sites for use by the plastering contractors under arrangements with the dealers. The practical effect of all this is a continuous and almost uninterrupted flow of plastering materials from out-of-state origins to Illinois job sites for use there by plastering contractors. Restraint or disruption of plastering work in the Chicago area thus necessarily affects this interstate flow of plastering materials adversely. Since 1938 the Chicago defendants have acted in concert to suppress competition among local plastering contractors, to prevent out-of-state contractors from doing any business in the Chicago area and to bar entry of new local contractors without approval by a private examining board set up by the union. The effect of all this has been an unlawful and unreasonable restraint of the flow in interstate commerce of materials used in the Chicago plastering industry."

Summarizing the holding of the District Court, Mr. Justice Black continued (p. 188):

> "The District Court did not question the foregoing and other factual allegations showed a combination to restrain competition among Chicago plastering contractors. But the court considered these allegations to be 'wholly a charge of local restraint and monoply,' not reached by the Sherman Act. And the court held that there was no allegation of fact which showed that these powerful local restraints had a sufficiently adverse effect on the flow of plastering materials into Illinois."

In reversing the District Court's judgment, Mr. Justice Black said (p. 189):

> "*We are not impressed by the argument that the Sherman Act could not possibly apply here because*

the interstate buying, selling and movement of plastering materials had ended before the local restraints became effective. .**Where interstate commerce ends and local commerce begins is not always easy to decide and is not decisive in Sherman Act cases.** .**See** *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 232." (Emphasis supplied.)

He further declared (189):

"That wholly business intrastate restraints can produce the effects condemned by the Sherman Act is no longer open to question. See e. g., *United States* v. *Women's Sportswear Manufacturers Assn.*, 336 U. S. 460, 464."

Let us note the pertinency of the *Employing Plasterers* case to the instant case:

In the *Employing Plasterers* case the defendants did a large volume of business in the building trades industry, importing materials in interstate commerce but ultimately delivering and using such materials in purely local transactions. In the instant case the defendant does a very large volume of business in the field of ice cream, importing its ingredients in interstate commerce but ultimately selling them, transformed into ice cream, in purely local sales."

B.

At least since this court's decisions in the Radovich, Klor's and Radiant Burners cases, there need be no showing of actual or imminently impending "public injury" under either the Sherman Act or the Clayton Act.

Under Point III of these reasons for the *Grant of Certiorari, post*, we demonstrate that since respondent's 101 discriminatory sales were concentrated in a period of 55 days in consummation of a threat of such discriminatory sales if petitioner should bid for the Chicago School Board's

lunch contracts and since the Chicago School Board itself constitutes a "market" for ice cream much larger than that of most small cities, there *was* an actual threat to achieve a complete monopoly in this market created by the wants of school children and there was therefore a threat to achieve a *quasi* monopoly in the City of Chicago.

But at least since this court's decisions in *Radovich* v. *National Football League*, 352 U. S. 445, *Klors, Inc* v. *Broadway Hale Stores*, 359 U. S. 207, and *Radiant Burners v. Peoples Gas. Co.*, 364 U. S. 656, there need be no "public injury" and no immediate threat thereof to sustain an anti-trust case under *either* the Sherman Act *or* the Clayton Act.

In the *Radovich* case, in which this court held that acts tending to create a monopoly in the field of the broadcasting and telecasting of football games violated the Sherman Act *and the Clayton Act*, Mr. Justice Clark stated at pages 435, 453 and 454:

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade,' *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 494, 614 (1953), and meet the requirements that *petitioner* has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the anti-trust laws by an aggrieved party. These laws protect the victims of the forbidden practices **as well as** the public. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 343 U. S. 219, 236 1948). **Furthermore, Congress itself has placed the private antitrust plaintiff in a more favorable position through the enactment of §5 of the Clayton Act.** *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558 (1951). In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specially set forth by Congress in those laws." (Emphasis supplied.)

In the language emphasized above, this court recognized that public injury is no more necessary under the Clayton Act, even without the Robinson-Patman Act, than it was necessary under the Sherman Act.

Indeed, it was the very purpose of the Clayton Act to dispense with the requirement of public injury at a time when such a requirement was thought to be an indispensable ingredient of a case under the Sherman Act; for if the threat of "restraint of trade" is present, the Sherman Act suffices and the Clayton Act is unnecessary.

It is therefore clear that even when we ignore the fact that respondent's 101 discriminatory sales were made in reprisal for petitioner's competitive bid for the Chicago School Board's lunch program those sales were made "in interstate commerce" within the power that Congress has exerted by the Clayton Act as amended by the Robinson-Patman Act and that they offend that Act as so amended.

III.

RESPONDENT'S DISCRIMINATORY SALES WERE MADE IN A CONCERTED EFFORT TO ACHIEVE A MONOPOLY FOR ITS ICE CREAM IN CHICAGO'S SCHOOL LUNCH PROGRAM. THEREFORE THOSE SALES VIOLATED THE ANTI-TRUST LAWS.

We have already demonstrated, under Point II, *ante*, that

(1) Respondent was engaged in interstate commerce,

(2) Its 101 discriminatory sales involved in this case were made in that commerce

and

(3) No "public injury" or immediate threat thereof need be shown under the Clayton Act

and that on these facts alone, without regard to respondent's actual purpose, motive or object in making those sales, the Clayton Act was violated.

But when regard is had to respondent's actual purpose, intent and motive, there emerges another and distinct reason why those sales violated the Clayton Act.

As the District Court recited in its Findings of Fact, Philip Sang, the respondent's Vice President, and Thomas Cummings, petitioner's Vice President, had a conversation in 1955, which was in substance as follows (App. III, p. vii):

> "'Tom, who was leaving his car there was—after some fifteen minutes of conversation, Tom just about as he was to take leave of me said, "Phil, how long have you served the school?"
>
> 'I said, "Some twenty odd years, Tom. Why, are you thinking about bidding?"
>
> 'He said, "I don't know."
>
> 'I said, "**Well, Tom you know if we lose that business we are certainly going to have to make an effort to fill the gap.**"
>
> 'And with that, Tom took leave and I drove on back to the plant.'

In the next 55 days, respondent made the sales complained of.

It did not cease its onslaught upon petitioner's customers in the Chicago market until petitioner brought a suit in the State Courts to enjoin these depredations on its trade.

What would have been the extent of respondent's campaign had petitioner not brought this suit, only respondent knows.

In the Court of Appeals, respondent's counsel argued that no inference of an intent to achieve a monopoly could be drawn from respondent's raiding of petitioner's customers; for, so respondent argued, "there were at least twenty-three other possible bidders, several of them huge national

organizations" and "As a matter of fact, there were several other bids (Stip., par. 7).

But respondent could best serve its purpose for future years, not by a punitive expedition against every business competitor or even against only every actual competitive bidder, but by pursuing such an expedition only against the *successful* bidder.

In this case, *petitioner was the successful bidder.*

A campaign of low prices to all customers of *all* bidders" would be ruinous to respondent.

A campaign of "low prices to customers of the *successful* bidder"would be ruinous only to the successful bidder.

It is therefore clear that if the Clayton Act required a showing of public injury or intent and threat thereof, that requirement would be met in this case.

In closing it should be noted that in order to simplify the issues in this case, petitioner disclaimed reliance upon the Sherman Act. (Appendix ...., *post*).

Petitioner is convinced that respondent's actions violate the Sherman Act.

But nevertheless petitioner rests its case upon the Clayton Act as amended by the Robinson-Patman Act, not upon the Sherman Act, because the violation of the Clayton Act is even clearer than is the violation of the Sherman Act and if respondent's actions violate the Clayton Act, as they clearly do, petitioner does not need the Sherman Act.

IV.

THE FACT THAT PETITIONER ITSELF HAS MADE SALES THAT VIOLATE THE CLAYTON ACT IS NOT A DEFENSE TO THE RESPONDENT IN THE INSTANT CASE.

The District Court held that since "*plaintiff itself*" [italics of the District Court] had made sales to retailers (though not, so far as the record shows, to any customer or former customers of respondent) "manufacturers, *including* plaintiff" [emphasis of the court] it could not maintain the present suit.

It is not clear whether the District Court reached this conclusion upon some latent premise of "unclean hands" or "estoppel" or upon an implicit thesis that petitioner's own discriminatory sales instanced a custom or usage that made the practice reasonable and therefore lawful.

But it is clear as it can be that the fact that a plaintiff has himself violated the anti-trust laws is never a defense to his suit against other violators; for the provisions of the anti-trust laws that allow treble damages are enacted in the interest and for the benefit of the public.

In *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211, this Court said at page 214:

> "If petitioner and others were guilty of infractions of the anti trust laws, they could be held responsible in appropriate proceedings against them by the Government or by injured private persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize them against liability to those they injure. Cf. *Fashion Originators' Guild* v. *Trade Commission*, 312 U. S. 457; *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, 242, 243."

In *Moore* v. *Mead's Fine Bread Co.*, 340 U. S. 944, this court, reversing the Court of Appeals below, 184 F. 2d

388, held that the fact that the plaintiff himself instigated a boycott that provoked the defendant's discriminatory sales was no defense to a suit under the Clayton Act.

See also *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457, holding that the fact that "style pirates" plagiarized the designs of competitors did not justify a violation of the anti-trust laws in retort for such plagiarism, this being true whether the "style piracy" was or was not itself "unfair competition".

CONCLUSION.

For the reasons developed above, petitioner submits that this court should grant *certiorari* in this case and reverse the judgments below.

Respectfully submitted,

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APPENDIX I.

THE OPINION OF THE COURT OF APPEALS OF APRIL 23, 1958, 257 FED. (2d) 417.

FINNEGAN, *Circuit Judge.*

We are reviewing the dismissal of plaintiff's complaint for injunctive relief and damages grounded in the: Sherman Anti-Trust Act,[1] Clayton Act,[2] Robinson-Patman Act,[3] Civil Rights Act [4] and the National School Lunch Act.[5] Without adjudicating the truth of plaintiff's allegations we can assume those which are well pleaded because of defendant's motion to dismiss the complaint and, then evaluate it, bearing in mind Mr. Justice Black's statement: "In appraising the sufficiency of the complaint we follow • • • the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 1957, 355 U. S. 41, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80. See also Rule 8, Federal Rules of Civil Procedure, 28 U. S. C.

Central Ice Cream Company, plaintiff, from whose complaint we report some admitted facts, and Golden Rod Ice Cream Company, defendant, are each respectively engaged in manufacturing ice cream from milk, cream and other ingredients in Illinois. After bringing in some essential ingredients from Wisconsin and other states, plaintiff sells its ice cream in Illinois and other states using interstate trucking for delivery. On the other hand defendant, as well, imports ingredients, for its product, in interstate commerce, and plaintiff alleges:

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[1] 15 U.S.C.A. § 1.
[2] 15 U.S.C.A. § 13.
[3] 15 U.S.C.A. § § 13a and 13b.

[4] 42 U.S.C.A. § 1985(3).
[5] 42 U.S.C.A. § 1753.

"So far as the plaintiff is informed the defendant makes no sale or deliveries of its ice cream outside of Illinois. But the defendant sells very substantial quantities of its ice cream to the Harvey Restaurant chain, whose exact corporate name is unknown to the plaintiff but is well known to the defendant. The defendant makes its deliveries of such ice cream to the Harvey restaurant chain at all or most of the railroad depots in Chicago. The Harvey chain, regularly and continually places a large portion of the ice cream that is thus delivered in the depots by the defendant on dining cars of passenger trains traveling in interstate commerce, the Harvey chain having dining car concessions with respect to many such trains. Thus the defendant is a conduit for the regular and continuous flow of such ice cream from the defendant's manufacturing plants in Illinois, where the ice cream is manufactured largely from ingredients imported into Illinois in interstate commerce, to the dining cars of passenger trains traveling in interstate commerce."

There are allegations about defendant's discriminatory and unlawful methods of competition which, conclusions of the pleader aside, manifest enough to warrant an assumption on our part they existed. What impact, if any, on interstate commerce there was is now a matter of proof, and *Moore* v. *Mead's Fine Bread Co.*, 1954, 348 U. S. 115, 75 S. Ct. 148, 99 L. Ed. 145, warrants letting this complaint survive defendant's motion.

The case is reversed and remanded to the district court with directions to overrule the motion to dismiss the complaint.

Reversed and remanded with directions.

APPENDIX II

THE JUDGMENT OF THE COURT OF APPEALS OF APRIL 23, 1958.

It is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed, with costs, and that this cause be, and it is hereby, remanded to the said District Court with directions to overrule The motion to dismiss the complaint.

APPENDIX III.

THE DISTRICT COURT'S MEMORANDUM, FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE OF WHICH REVIEW IS PRESENTLY SOUGHT, 184 F. SUPP. 312.

CAMPBELL, *Chief Judge.*

Plaintiff, Central Ice Cream Company, an Illinois corporation, brought this action for injunctive relief and damages against Golden Rod Ice Cream Company, an Illinois corporation, alleging conduct by defendant in violation of the Sherman Anti-Trust Act, Title 15, U. S. C. Section 1, the Clayton Act, Title 15 U. S. C. Section 13, the Robinson-Patman Act, Title 15 U. S. C. Sections 13(a) and (b), the Civil Rights Act, Title 42 U. S. C. Section 1985 (3) and the National School Lunch Act, Title 42 U. S. C. Section 1753. Plaintiff has since expressly disclaimed any reliance upon all except one of the above statutes and the case now comes on for disposition upon a Stipulation of Facts and the exhibits and briefs of the parties, plaintiff resting its claim for relief exclusively upon Section 2 of the Clayton Act as amended by Section 1 of the Robinson-Patman Act, Title 15 U.S.C. Sections 13 (a)-(F).

Plaintiff maintains an ice cream manufacturing plant and garage in Chicago, Illinois, a distribution plant and garage in Joliet, Illinois, and has a fleet of approximately thirty trucks and other items of equipment all of which are used in its business of manufacturing and selling ice cream in Indiana and Illinois. During the calendar year 1955 plaintiff sold 99.975% of its ice cream to retailers in Illinois and and .025% to retailers in Indiana.

During the year 1955, with which we are concerned here, milk received in the Chicago milk marketing area from Illinois and Wisconsin totaled 4,403,121,129 pounds. The said milk averaged 3.60 pounds of butterfat per hundred pounds of milk and thus contained 158,512,385 pounds of butterfat. The total pounds of butterfat used by ice cream

manufacturers in 1955 was 9,594,483 pounds or 6.052% of the total butterfat received in the Chicago milk marketing area in 1955. Plaintiff used 0.322% of the butterfat reaching the Chicago milk marketing area in 1955 and used 5.318% of the total butterfat used in the production of ice cream by all ice cream handlers in the Chicago marketing area in 1955.

Defendant maintains an ice cream manufacturing plant in Chicago, Illinois, and sells and delivers ice cream, sherbets and other frozen desserts solely within the State of Illinois. In 1955, defendant used 0.452% of the butterfat reaching the Chicago milk marketing area from Illinois and Wisconsin and 7.468.% of the total butterfat used in the production of ice cream by all ice cream handlers in the Chicago marketing area.

Defendant, among other customers, sells and delivers ice cream to Fred Harvey, a New Jersey corporation, all sales and deliveries taking place in Chicago. These sales and deliveries are made at the Union Station and Polk Street Station for consumption and sale only in the restaurants or lunch rooms operated by Fred Harvey in these railroad depots. Sales and deliveries of ice cream by defendant have also been made to two other Fred Harvey restaurants, located at 919 North Michigan Avenue, Chicago, and 308 South Michigan Avenue, Chicago, for sale and consumption in said restaurants. A small portion of total sales by defendant to Fred Harvey is delivered to the Fred Harvey Commissary, 2014 South Wentworth Avenue, Chicago. This ice cream is subsequently resold by Fred Harvey to the Atchison, Topeka & Santa Fe Railroad Company and used in the dining cars of that railroad company traveling between Chicago and the Pacific Coast. Defendant has had no dealings, contractual or otherwise, with the railroad company with respect to the sale of ice cream and has not exercised any control or domination over the use or disposition of such ice cream by Fred Harvey subsequent to its sale and delivery to Fred Harvey in Chicago. None of the ice cream sold to Fred Harvey by the defendant is of the same or like grade and quality sold by defendant to any other customer,

but is made to Fred Harvey's special formula and is richer in butterfat. Defendant's deliveries to the Fred Harvey Commissary in 1955 comprised 0.095% of the total butterfat allocated to ice cream manufacturers and 0.005% of total butterfat reaching the Chicago milk marketing area.

For many years prior to November 5, 1955, defendant had sold and supplied ice cream to public authorities and agencies in Illinois, one of which was the Board of Education of the City of Chicago, which purchased the products for re-sale to school children. In 1955 plaintiff intended to submit a bid to the Board of Education of the City of Chicago for the sale of ice cream for its school lunch program. On November 3, 1955, the following conversation took place between Philip Sang, then defendant's Vice-President, and Thomas N. Cummings, plaintiff's Vice-President in 1955:

> "Tom, who was leaving his car there— after some fifteen minutes of conversation, Tom just about as he was to take leave of me said, 'Phil, how long have you served the schools?'
>
> "I said, 'Some twenty odd years, Tom. Why, are you thinking about bidding?'
>
> "He said, 'I don't know.'
>
> "I said, 'Well, Tom, you know if we lose that business we are certainly going to have to make an effort to fill the gap.'
>
> "And with that, Tom took leave and I drove on back to the plant."

Subsequently, plaintiff did submit its bid to the Chicago Board of Education and the bid was accepted. In the six or seven weeks following November 4, 1955, the defendant's salesmen called on plaintiff's customers in the Chicago area within the State of Illinois, and not elsewhere, soliciting their ice cream business, and in many instances made loans of money to said customers by way of advanced discounts in order to procure their business. Such loans were represented by customers' notes payable to defendant, and in most instances were to be amortized or repaid out of a

special discount, usually at the rate of ten cents per gallon, to be allowed such customers upon their purchases of ice cream from the defendant. Such loans were not uniform in amount, but were based upon the defendant company's estimate of the potential volume of business to be procured from each of said customers. Defendant did not at that time make or offer to make similar advances of money to all of its then customers in the Chicago area, but "such advances or loans were made to meet competition from the plaintiff and other purveyors of ice cream in the Chicago area."

A total of 101 customers of plaintiff, all located within the Chicago area within the State of Illinois, subsequently became customers of the defendant. Their names, the advances made by defendant and the security for these advances are recited in Exhibit 1 to the Stipulation. The total of such advances is $13,730.00, plus, in one instance, the loan of two air conditioners to a customer of plaintiff.

In 1955 and presently, approximately twenty-five ice cream manufacturing firms were located in Chicago. Several of these manufacturers are huge companies with plants in many different areas, as for example, Bordens, National Dairy Products and Swift & Company.

Competition for ice cream business in Chicago has been for many years and is now very intense. Retailers with any considerable volume or potential volume of retail sales bargain extensively with manufacturers for financial help in the way of loans or special price concessions. Manufacturers have and do make loans or give special prices or special discounts to retailers to procure or hold their business. All of the larger ice cream manufacturers periodically publish price lists and such published prices are fairly comparable. In 1955 plaintiff had in effect a price list substantially comparable to defendant's published price list. Plaintiff's price list allowed discounts on a quantity basis up to 12¢ per gallon. Defendant's list allowed comparable quantity discounts to a maximum of 8¢ per gallon. Ice cream packed in containers of one-half gallon capacity or

less is considered "packaged" goods, as distinguished from "bulk". In 1955, from January until June, plaintiff allowed one food mart operator a discount of 30¢ per gallon from its list, when packed in pint packages, and 32¢ per gallon discount when packed in one-half gallon packages. In addition, plaintiff made loans to such operator in the amount of $25,000.00 each with respect to two stores, and $15,000.00 with respect to another store operated by said operator. Plaintiff did not make comparable loans and discounts to all of its customers. In addition, in these cases, it assisted in promotional sales from time to time, under which these food marts were able to buy for limited periods of three to five days ice cream at $1.04 per gallon, as compared with the list price of $1.78 per gallon. With another operator of food marts, plaintiff advanced loans at the rate of $25,000.00 each for two stores, amortizable over a 24-month period and bearing interest at the rate of one per cent per annum.

Defendant over the years has made many loans to its own customers, retail dealers in ice cream in Chicago, many of which were in the way of advance discounts repayable at 10¢ per gallon on all purchases by such retailers. Defendant has made such loans in order to meet and to attempt to meet competition in the sale of ice cream in Chicago.

It is a uniform practice in the industry in the Chicago area for manufacturers of ice cream to furnish retailers with mechanically refrigerated cabinets for the storage of ice cream in their retail stores. When a retailer changes from one manufacturer and becomes a customer of another, the manufacturer taking over the service removes the original vendor's cabinets and equipment and returns the same to the owner. It has been a general practice in the industry to allow retailers who purchase their own storage cabinets a discount of 10¢ a gallon off the published list prices in consideration of that fact. Both the plaintiff and the defendant have, with other competitors, followed said practice and have felt compelled to do so to meet competition in the area.

During 1955 plaintiff's sales manager had authority to quote any price on bulk ice cream—as distinguished from packaged ice cream—necessary to procure the business. Plaintiff sold bulk ice cream in the summer season of 1955 to Riverview Park at at price of $1.00 per gallon. It sold Northwestern University for a few weeks in 1955 at $1.20 per gallon.

On July 22, 1957, I dismissed this complaint for failure to state a claim upon which relief may be granted under any of the several statutes set forth in the complaint as originally relied upon. As I then pointed out:

> "The complaint alleges that plaintiff is an ice cream manufacturer in Illinois; that it 'imports a very substantial part of its milk, cream and other ingredients from Wisconsin and other states in interstate commerce, transforms them into ice cream in Illinois and sells this ice cream very extensively both in Illinois and in other states'; that defendant is engaged in manufacture of ice cream also and obtains the raw materials from other states but that 'so far as the plaintiff is informed the defendant makes no sales or deliveries of its ice cream outside Illinois.' The gravamen of the complaint is that sometime in November, 1955, plaintiff and defendant submitted rival bids to the Board of Education of the City of Chicago, for the supply of ice cream for use in the Board's school lunch program, which is subsidized by the Federal Government under the National School Lunch Act; that defendant warned plaintiff that if it should persist in its bid to secure a contract with the Board, defendant would make a concentrated effort to deprive plaintiff of its customers. The complaint further alleges that the contract was awarded to the plaintiff and that thereupon defendant launched a campaign to solicit away most of plaintiff's customers 'in the Chicago area' offering loans, air conditioning units, deep freeze units and other items of personal property on condition that plaintiff's customers desert plaintiff and patronize defendant."

The Court of Appeals in reversing and remanding with directions on April 23, 1958, made the following statement:

> "Central Ice Cream Company, plaintiff, from whose complaint we report some admitted facts, and Golden Rod Ice Cream Company, defendant, are each respectively engaged in manufacturing ice cream from milk, cream and other ingredients in Illinois. After bringing in some essential ingredients from Wisconsin and other states, plaintiff sells its ice cream in Illinois and other states using interstate trucking for delivery. On the other hand defendant, as well, imports ingredients, for its product, in interstate commerce, and plaintiff alleges:
>
> > 'So far as the plaintiff is informed the defendant makes no sale or deliveries of its ice cream outside of Illinois. But the defendant sells very substantial quantities of its ice cream to the Harvey Restaurant chain, whose exact corporate name is unknown to the plaintiff but is well known to the defendant. The defendant makes its deliveries of such ice cream to the Harvey restaurant chain at all or most of the railroad depots in Chicago. The Harvey chain, regularly and continually places a large portion of the ice cream that is thus delivered in the depots by the defendant on dining cars of passenger trains traveling in interstate commerce, the Harvey chain having dining car concessions with respect to many such trains. Thus the defendant is a conduit for the regular and continuous flow of such ice cream from the defendant's manufacturing plants in Illinois, where the ice cream is manufactured largely from ingredients imported into Illinois in interstate commerce, to the dining cars of passenger trains traveling in interstate commerce.'
>
> There are allegations about defendant's discriminatory and unlawful methods of competition which, conclusions of the pleader aside, manifest enough to warrant an assumption on our part they existed. What

impact, if any, on interstate commerce there was is now a matter of proof, and *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115 (1954) warrants letting this complaint survive defendant's motion."

Section 2 of the Clayton Act, as amended by Section 1 of the Robinson-Patman Act, Title 15 U. S. C., Section 13(a)-(f) provides as follows:

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price bewteen different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and estab-

lished; And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction

other than the person by whom such compensation is so granted or paid.

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

Shortly after the passage of the Robinson-Patman Act, Zorn and Feldman, in "Business under the New Price Laws", after carefully considering its economic background and legislative history, analyzed its provisions as follows at page 62:

"1. There must be a discrimination between two or more customers of a given seller.

2. The difference in price must be made in connection with commodities of 'like grade and quality.'

3. One of the purchases involved must be in interstate commerce.

4. The commodities involved must have been sold for use, consumption, or resale within the United States or its territories or insular possessions, and not for purposes of export. (Under the definition in the Clayton Act, insular possessions do not include the Philippine Islands.)

5. The transaction must involve the sale of commodities and not the sale of services.

6. Even if each of the above factors is present, a discrimination is not unlawful unless, in addition to the foregoing, its effect may:

(a) Substantially lessen competition in any line of commerce; or

(b) Tend to create a monopoly in any line of commerce; or

(c) Injure, destroy, or prevent competition:

(1) With the person who grants the discrimination.

(2) With or among any of his customers.

(3) With the person who knowingly receives the discrimination.

(4) With or among any of his customers.

(5) With or among the customers of either of them.

The injury or suppression of competition must be such as sufficiently to affect, burden, or constitute an impediment to interstate commerce."

Defendant, while not pursuing the above exhaustive analysis of Section I of the Robinson-Patman Act, points out that by the express terms of the section, the plaintiff, in order to recover, has the burden of showing:

(1) That defendant was engaged in commerce;

(2) Discrimination by the defendant "in the course of such commerce . . . in price between different purchasers of commodities of like grade and quality . . .";

(3) That" "the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce or to endanger, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them."

Defendant thus argues that:

(1) Defendant was not engaged in commerce;

(2) Defendant did not "in the course of such commerce, either directly or indirectly, discriminate in price between different purchasers of commodities of like grade and quality, whether either or any of the purchases involved in such discrimination are in commerce;

(3) The proof shows that there was *not* any impact on commerce.

As to defendant's first argument, I find that defendant was not "engaged in commerce".

Though it is conceded that many of the ingredients, such as flavoring extracts, nuts, sugar and cocoa, which are used in the manufacture of ice cream come from outside of the State, it is clear that when these ingredients reach defendant's Chicago plant, they have come to rest and commerce has ceased. *Ewing Von Allman* v. *C & C Ice Cream Co., Inc.*, 109 F. 2d 898. The fact that the defendant used 0.452% of the butterfat reaching the Chicago milk marketing area in 1955 from intrastate and interstate sources does not, in my opinion, establish defendant as a "person engaged in commerce".

I further find that defendant is not "a conduit for the regular and continuous flow of . . . ice cream from the defendant's manufacturing plants in Illinois, where the ice cream is manufactured largely from ingredients imported into Illinois in interstate commerce, to the dining cars of passenger trains traveling in interstate commerce".

The sale of ice cream, comprising 0.005% of the total butterfat reaching the Chicago milk marketing area in 1955

from intrastate and interstate sources, by defendant to the Fred Harvey Commissary, 2014 S. Wentworth Avenue, Chicago, does not in any way establish defendant as a "conduit" into interstate commerce since defendant exercised no control or dominion over the use or disposition of such ice cream by Fred Harvey after its sale and delivery to that company and therefore cannot be legally associated with Fred Harvey's subsequent sale of the ice cream to the Atchison, Topeka and Santa Fe Railroad.

As to defendant's second argument, it is obvious from what I have said above, that defendant could not "in the course of such commerce" discriminate between different purchasers. However, assuming that defendant is in the "course of commerce" because of its sales and deliveries to the Fred Harvey Commissary, then there could be no discrimination between different purchasers of commodities of "like grade and quality", since the ice cream sold by defendant to Fred Harvey was made to Harvey's special formula and is different in grade and quality from the ice cream sold by defendant to all its other customers.

As to defendant's third argument, I find that the . was not any impact on commerce. In the Stipulation of Facts, Exhibits 3, 3A and 3B graphically portray, first, the amount of butterfat received in the Chicago milk marketing area for the calendar year 1955; second, the total amount of such butterfat utilized by all the ice cream manufacturers in the marketing area; third, the portion of such butterfat utilized in such period by either of the parties, and fourth, the quantity and proportion of such butterfat involved in the defendant's sales to Harvey and the portion involved in defendant's deliveries to the Harvey Commissary, this latter being the amount that Harvey in turn resold to the railroad. From Exhibit 3, it thus appears that of the total butterfat brought into the Chicago milk marketing area during 1955, the defendant used less than one-half of one per cent, the precise figure being 0.452%; while the plaintiff used less than one-third of one per cent, the precise figure being 0.322%. There is no showing as to how much of the total butterfat received in the market during that year came in

from the State of Wisconsin, but from paragraph 3 of the Stipulation, it appears that this butterfat came from milk originating in the States of Wisconsin and Illinois, so it is apparent that the percentages of use by the parties shown in Exhibit 3 includes butterfat originating within Illinois.

It appears from Exhibit 3B that of the more than 158,000,000 pounds of butterfat brought into the market, slightly over 9,000 pounds were involved in defendant's deliveries to the Fred Harvey Commissary, representing less than 1/10th of 1% of butterfat used in ice cream in the Chicago market and slightly over ½ of 1/100th of 1% of the total butterfat coming into the Chicago market.

In addition, defendant in 1955 did not sell or deliver any ice cream outside the State of Illinois while plaintiff sold and delivered 99.975% of its ice cream in Illinois and only 0.25% in Indiana.

Furthermore, I find no proof of discrimination here. It appears affirmatively from the Stipulation that the practices complained of have been consistently carried on by manufacturers of ice cream in the Chicago area. Because of "intense competition", manufacturers, *including plaintiff*, have regularly made loans and special price concessions to retailers in order to procure or hold their business and to meet competition. *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356. Even assuming discrimination and interstate commerce, it is clear from the Stipulation, as I have previously found, that the effect of such discrimination does not "*substantially* lessen competition or tend to create a monopoly in any line of commerce, or injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them". (Emphasis supplied.)

Plaintiff has argued extensively from *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 204 and *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115.

Insofar, as *Klor* is concerned, I think it patently obvious from a clear analysis of that case, that its teachings are not applicable here.

Although, as the Court of Appeals has indicated, the instant complaint contains allegations which, if proved, could bring this cause within the purview of *Moore*, I now find that the evidence before me does not bring this cause within the required proofs of that case, since defendant is not an "interstate industry" as the defendant in *Moore* and there has been no discrimination here with an impact on interstate commerce.

For the reasons stated, the cause is dismissed at plaintiff's costs. Judgment for defendant. The foregoing shall, in accordance with the provisions of Rule 52 (a) of the Rules of Civil Procedure, 28 U. S. C., stand as the Court's Findings of Fact and Conclusions of Law herein.

CAMPBELL,
Chief Judge.

Date: 6/16/60.

APPENDIX. IV.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Wednesday, February 8, 1961

Before HON. ELMER J. SCHNACKENBERG, *Circuit Judge*, HON. WIN G. KNOCH, *Circuit Judge*, HON. LATHAM CASTLE, *Circuit Judge*.

No. 13099

Central Ice Cream Company, Plaintiff-Appellant, vs. Golden Rod Ice Cream Company, Defendant-Appellee.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

APPENDIX V.

UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.

Central Ice Cream Company, an Illinois corporation, *Plaintiff*, vs. Goldenrod Ice Cream Company, an Illinois corporation, *Defendant.*	Civil Action No. 56-C-1010.

STIPULATION OF FACTS.

20 The plaintiff and the defendant, through their respective counsel, stipulate that the Court may find the following facts in this case. The parties do not stipulate that any of these facts are material and respectively reserve the right to object to any of the stipulated facts on the ground that the same are not material, relevant or competent in this case. This stipulation is not an admission to be used in any litigation other than in this case and is not to be used in any other proceedings of any kind or character against either of the parties. The parties do not stipulate as to any inference of law to be drawn from these facts.

21 1. (a) That Section 1 of the Sherman Anti-Trust Act (15 U. S. C. A. Section 1) is not applicable to this case.

(b) That Section 3 of the Robinson-Patman Act (15 U. S. C. A. 13a) stated in paragraph 10 of the complaint as

the "Clayton Act, 15 U. S. C. A., Section 13" is not applicable to this case.

(c) That the National School Lunch Act (42 U. S. C. A., Section 1753) is not applicable to this case.

(d) That the Civil Rights Act (42 U. S. C. A., Section 1985(3)) is not applicable to this case.

(e) That plaintiff relies upon Section 2 of the Clayton Act, as amended by Section 1 of the Robinson-Patman Act (15 U. S. C. A.—13(a)—(f)).

2. That at all times mentioned in the complaint, the plaintiff and the defendant, both Illinois corporations, maintained ice cream manufacturing plants in the City of Chicago and have since been and now are engaged in the manufacture of ice cream, sherbets and other frozen desserts in said plants and in the sale of said products to retailers in the Chicago area.

22 3. At all times mentioned in the complaint, a substantial part of the ingredients used by the plaintiff in the manufacture of ice cream, principally butterfat, came from milk originating in the States of Wisconsin and Illinois. Defendant, during said times, purchased all of the butterfat used by it in the manufacture of ice cream in Chicago from brokers located in Chicago, but a substantial part of said butterfat sold by brokers to the defendant came from milk originating in the States of Wisconsin and Illinois.

4. At all times mentioned in the complaint, the plaintiff has sold and still sells its ice cream to retailers in Illinois and Indiana. Of Plaintiff's total output of ice cream during the calendar year 1955, to-wit, 1,433,801 gallons, 99.975% or 1,398,239 gallons thereof was sold and delivered to retailers in the State of Illinois; and .025%, or 35,562 gallons thereof, was sold and delivered to retailers in the State of Indiana. No part thereof was sold and delivered to retailers in the State of Michigan. The plaintiff maintains an ice cream manufacturing plant and garage in Chicago, Illinois, a distribution plant and garage in

Joliet, Illinois, and has a fleet of approximately thirty
23 trucks and other items of equipment, all of which are used in its business of manufacturing ice cream and selling ice cream in Illinois and Indiana in the respective percentages herein in this paragraph set forth as to each of said States.

5. At all times mentioned in the complaint and for many years prior thereto and up to the present time, the defendant has sold and delivered its ice cream and other frozen desserts solely within the State of Illinois. Defendant has no ice cream business of any kind or nature outside the State of Illinois.

6. For many years prior to November 5, 1955, the defendant had sold and supplied ice cream to certain public authorities or agencies within the State of Illinois, one of which was the Board of Education of the City of Chicago, which purchased the said product for resale to school children. Said ice cream was not furnished under the National School Lunch Act, nor was the Board of Education reimbursed for such purchases out of any Federal funds.

7. In 1955 the plaintiff intended to submit a bid to
24 the Board of Education of the City of Chicago for the sale of ice cream for use by said Board for resale to school children for the year 1956, and it did submit such bid. All bids submitted were sealed bids and were opened in public by the Board of Education on November 25, 1955. Bids were received from the plaintiff, from the defendant, and from several other ice cream companies. Plaintiff's bid was accepted. It was awarded the contract and on or about February, 1956 began deliveries thereunder.

8. If Philip Sang, the defendant's then Vice-President, was called as a witness, he would testify, and the Court may find, that a conversation occurred between him and Thomas N. Cummings, plaintiff's then Vice- President, on the morning of November 3, 1955, at 95th Street and Ashland Avenue, and the Court may find that that conversation, so far as it relates to matters charged in plaintiff's complaint, was as follows:

"Tom, who was leaving his car there was—after some fifteen minutes of conversation, Tom just about as he was to take leave of me said, 'Phil, how long have you served the schools?'

"I said, 'Some twenty odd years, Tom. Why, are you thinking about bidding?'

"He said, 'I don't know.'

"I said, 'Well, Tom, you know if we lose that business we are certainly going to have to make an effort to fill the gap.'

"And with that, Tom took leave and I drove on back to the plant."

9. In the six or seven weeks following November 4, 1955, the defendant's salesmen called on plaintiff's customers in the Chicago area within the State of Illinois, and not elsewhere, soliciting their ice cream business, and in many instances made loans of money to said customers by way of advanced discounts in order to procure their business. Such loans were represented by customers' notes payable to defendant, and in most instances were to be amortized or repaid out of a special discount, usually at the rate of ten cents per gallon, to be allowed such customers upon their purchases of ice cream from the defendant. Such loans were not uniform in amount, but were based upon the defendant company's estimate of the potential volume of business to be procured from each of said customers. Defendant did not at that time make or offer to make similar advances of money to all of its then customers in the Chicago area, but such advances or loans were made to meet competition from the plaintiff and other purveyors of ice cream in the Chicago area.

10. A list of the then customers of the plaintiff who later became customers of the defendant during the period mentioned in Paragraph No. 9 above, is appended hereto as Exhibit 1. All of said customers were located in the Chicago area, within the State of Illinois.

11. At all times mentioned in the complaint, the defendant made, and still makes, sales and deliveries of ice cream

to Fred Harvey, a New Jersey corporation, all of such sales and deliveries were and are made only in Chicago, Illinois, and defendant has made no sales or deliveries to Fred Harvey other than in the said City of Chicago. Said sales and deliveries have been made to said Fred Harvey, at all times mentioned in the complaint, at certain railroad stations, namely, the Union Station and the Polk Street Station, in Chicago, Illinois, for consumption and sale only in the restaurants or lunch rooms operated by said Fred Harvey in said railroad depots. Sales and deliveries of ice cream by the defendant also have been made to two other restaurants operated by Fred Harvey at 919 North Michigan Avenue, Chicago, Illinois, and 308 South Michigan Avenue, Chicago, Illinois, for sale and consumption only in said restaurants. A small portion of the total
27 of said sales to Fred Harvey by the defendant, as will hereinafter appear, is delivered by it to the Fred Harvey Commissary at 2014 South Wentworth Avenue, Chicago, Illinois, and the ice cream so delivered and sold to Fred Harvey at the said Wentworth Avenue address is resold by Fred Harvey to the Atchison, Topeka & Santa Fe Railroad Company and used in the dining cars of that railroad company, which dining cars travel between Chicago and the Pacific Coast and intermediate points. All of the defendant's sales to Fred Harvey, including the sales and deliveries to the said Commissary, were and are invoiced to Fred Harvey in Chicago, Illinois, and are paid to the defendant by Fred Harvey checks. Defendant has had no contact or dealings, contractual or otherwise, whatsoever with the Atchison, Topeka & Santa Fe Railroad with respect to the sale of any ice cream, nor does it place, nor has it placed, any of said ice cream in dining cars. Defendant has exercised and now exercises no control or domination over the use or disposition of such ice cream by Fred Harvey from and after the sale and delivery of such ice cream to Fred Harvey in Chicago, Illinois. Fred Harvey does not operate any food mart, drug store, grocery store or any retail establishment devoted princi-
28 pally to the sale of ice cream at retail either in the City of Chicago, or elsewhere.

12. None of the ice cream which the defendant sells to Fred Harvey is of the same or like grade and quality sold by defendant to any other customer, but, on the contrary is made to the Fred Harvey special formula and is richer in butterfat than ice cream made and sold by the defendant to all other customers.

13. Since July 1, 1940, the handling and sale of milk and milk products in the Chicago marketing area has been regulated by Order No. 41 promulgated by the Secretary of Agriculture of the United States pursuant to the Agricultural Adjustment Act of 1937, as amended (7 U. S. C. 601, et seq.). At the time mentioned in the complaint, the Chicago marketing area as defined in Order No. 41, as then in effect, comprised Cook and DuPage Counties, seven townships and the City of Barrington in Lake County, six townships in Kane County, nine townships in Will County, all in the State of Illinois, and three townships in Lake County, Indiana. By the terms of said Order, every handler of milk coming into the said marketing area is required to report monthly certain data to the Federal Milk Market Administrator, whose office audits and verifies all such
29 reports. Milk is classified under said Order in accordance with its ultimate utilization. For example, milk which is disposed of as fluid milk is classified as Class I Milk, the butterfat from which is ultimately used in ice cream or in fluid cream, falls in Class II. Manufacturers of ice cream and similar frozen desserts in the City of Chicago were and are required by the terms of the Pure Milk Ordinance of said City to produce their products solely from milk originating on farms approved by the Chicago Board of Health and processed in plants approved by said Board of Health. All Chicago manufacturers of ice cream, at all times referred to in the complaint and presently, are required to report monthly to the Federal Milk Market Administrator the number of pounds of butterfat utilized in the production of ice cream and similar frozen deserts. There are attached hereto as Exhibits 2, 2A and 2B copies of Tables 3, 8 and 29, respectively, prepared by the Federal Milk Market Administrator for his June, 1956 statistical compilation under Order No. 41.

Exhibit 2 (Table 3) shows the total pounds of milk received in the Chicago Milk Marketing Area in 1955, by months, which when added totals 4,403,121,129 pounds.

Exhibit 2A (Table 8) shows that said milk averaged
30 3.60 pounds of butterfat per hundred pounds of milk.

By computation, it appears, therefore, that said milk contained 158,512,385 pounds of butterfat. Exhibit 2B (Table 29) shows the total pounds of butterfat used by ice cream manufacturers in 1955, by months, which added totals 9,594,483 pounds. From these figures, it is apparent that of the total butterfat received in the Chicago milk marketing area in 1955, there was utilized by the ice cream manufacturers 6.052%.

14. Exhibit 3 attached hereto shows the total amount of butterfat used by the defendant in 1955 in the production of ice cream and ice cream mix, from which it appears that defendant used 0.452% of the butterfat reaching said market; and Exhibit 3A shows that defendant used 7.468% of the total butterfat used in the production of ice cream by all ice cream handlers in the Chicago marketing area.

15. Exhibit 3 attached hereto shows the total amount of butterfat used by the plaintiff in 1955 in the production of ice cream and ice cream mix, from which it appears that plaintiff used 0.322% of the butterfat reaching said market; and Exhibit 3A shows that plaintiff used
31 5.318% of the total butterfat used in the production of ice cream by all ice cream handlers in the Chicago marketing area.

16. Exhibit 3B attached hereto shows the relationship of the defendant's sales to Fred Harvey, to the total Chicago area ice cream market in 1955. The figures allocated to "Commissary" represents total butterfat used in production of products which were delivered by defendant to the Fred Harvey Commissary at 2014 South Wentworth Avenue, Chicago; "Other" represents all other Fred Harvey locations served by the defendant.

17. In 1955 and presently, approximately twenty-five ice cream manufacturing firms were located in the City of

Chicago. Several of these manufacturers are huge companies with plants in many different areas, for example, Bordens, National Dairy Products, and Swift & Company.

18. Competition for ice cream business in Chicago has been for many years and is now very intense. Retailers with any considerable volume or potential volume of retail sales bargain extensively with manufacturers for financial help in the way of loans or special price concessions. Manufacturers have and do make loans or give special prices or special discounts to retailers to procure or hold
32 their business. All of the larger ice cream manufacturers periodically publish price lists and such published prices are fairly comparable. In 1955 plaintiff had in effect a price list substantially comparable to defendant's published price list. Plaintiff's and defendant's price lists are attached hereto as Exhibits 4 and 5, respectively. Plaintiff's price list allowed discounts on a quantity basis up to 12¢ per gallon. Defendant's list allowed comparable quantity discounts to a maximum of 8¢ per gallon. Ice cream packed in containers of one-half gallon capacity or less is considered "packaged" goods, as distinguished from "bulk." In 1955, from January until June, plaintiff allowed one food mart operator a discount of 30¢ per gallon from its list, when packed in pint packages, and 32¢ per gallon discount when packed in one-half gallon packages. In addition, plaintiff made loans to such operator in the amount of $25,000.00 each with respect to two stores, and $15,000.00 with respect to another store operated by said operator. Plaintiff did not make comparable loans and discounts to all of its customers. In addition, in these cases, it assisted in promotional sales from time to time, under which these food marts were able to buy for limited periods of three to five days ice cream at $1.04
33 per gallon, as compared with the list price of $1.78 per gallon. With another operator of food marts, plaintiff advanced loans at the rate of $25,000.00 each for two stores, amortizable over a 24-month period and bearing interest at the rate of one per cent per annum.

19. Defendant over the years has made many loans to its own customers, retail dealers in ice cream in Chicago, many of which were in the way of advance discounts repayable at 10¢ per gallon on all purchases by such retailers, and defendant has made such loans only in order to meet and to attempt to meet competition in the sale of ice cream in Chicago.

20. It is a uniform practice in the industry in the Chicago area for manufacturers of ice cream to furnish retailers with mechanically refrigerated cabinets for the storage of ice cream in their retail stores. When a retailer changes from one manufacturer and becomes a customer of another, the manufacturer taking over the service removes the original vendors cabinets and equipment and returns the same to the owner. It has been a general practice in the industry to allow retailers who purchase their own storage cabinets a discount of 10¢ a gallon off
34 the published list prices in consideration of that fact. Both the plaintiff and the defendant have, with other competitors, followed said practice and have been compelled to do so to meet competition in the area.

21. During 1955 plaintiff's sales manager had authority to quote any price on bulk ice cream—as distinguished from packaged ice cream—necessary to procure the business. Plaintiff sold bulk ice cream in the summer season of 1955 to Riverview Park at a price of $1.00 per gallon. It sold to Northwestern University for a few weeks in 1955 at $1.20 per gallon.

22. In December of 1955, plaintiff instituted a suit against defendant in the Superior Court of Cook County, Illinois, complaining of the same actions, in substance, as plaintiff complains of in this case, except that in the Superior Court suit it was not contended that that court had jurisdiction of alleged violations of the Federal Anti-Trust Laws. The Honorable John Lupe, Judge of the Superior Court, sitting as a chancellor, heard extensive evidence in connection with plaintiff's motion for a temporary restraining order restraining the defendant from soliciting

any of its customers or giving any special prices or
35 discounts to them. Many exhibits were received by the Chancellor and a record of nearly one thousand typewritten pages was compiled over a period of several weeks. At the conclusion of said hearings, Judge Lupe found that the plaintiff had failed to sustain its burden of proof, and found that there had been no violation by the defendant of any Illinois law and denied the motion for a temporary injunction. He later permitted the plaintiff to dismiss that suit without prejudice.

23. It is stipulated that if Edward L. Olin, President of the defendant company, and Philip D. Sang, Vice-President of the defendant company, were sworn and testified as witnesses in this case, they, and each of them, would testify, as they testified under oath in the State Court proceedings mentioned in Paragraph No. 22 hereof, that in the year 1955 they entertained no malice towards the plaintiff and no intention or desire to ruin or damage it; but that in soliciting plaintiff's customers they were motivated only by a desire to increase their own share of the market in the industry within the State of Illinois.

36 24. That the net prices received by Goldenrod from former customers of the plaintiff, shown on Exhibit 1, after computation of all discounts, was as shown on Exhibit 6 hereto attached.

25. That in the Superior Court suit above mentioned, there was no evidence of any gifts of equipment by the defendant to any of plaintiff's former customers; that the only loan of equipment other than equipment normally furnished by all or most manufacturers in the industry to their customers was the case of a loan of two air-conditioning units by the defendant to a former customer of the plaintiff. In that case, the plaintiff had offered the cus-

tomer a loan of one air-conditioning unit.
Dated: October 31st, 1959.

William C. Wines,
J. Stirling Mortimer,
Daniel J. Ryan,
Attorneys for Plaintiff.

Grover D. Rose,
Philip A. Rose,
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Attorneys for Defendant.

Exhibit 1.

Name of Customer	Advancements by Goldenrod	Security for Loan
37 Thrift-way Food Store	$1,000.00	Note and 2 yr. contract
Rush Liquors	None	
Elvira Bautista	$25.00 free ice cream	
Nathan Rumack	$100.00	None
Grocerland (Peter Panos)	None	
Bob's Farm Store	$125.00	None
Patti's Food Mart	$50.00	None
Royal Blue Store	$20.00 free ice cream	
John Winkler	2 Air conditioners loaned	
Tom & Jean's Foods	$50.00	None
Belmont Food Shop	$50.00	None
Koffe Kup	$25.00 free ice cream	
Grocerland (Joseph Estok)	$100.00	None
Turner Grocery	None	
George Lazaris	None	
Herbert Shore	$50.00	None
Carl's Food Shop	$25.00 free ice cream	
Kaplan Drugs, Inc.	$500.00	None
Bergeron's Foods	$100.00	None
Sue's Grocery	$200.00	None
38 Lill's Food Shop	$65.00	None
Weinberg Bros. Super Mart	$1,000.00	Contract for 3 yrs. or 10,000 gals.
Main Liquor Mart	None	
Olandese Bros. Super Food Mart	$100.00	Contract for 1,000 gal.
Royal Blue Store	$450.00	Contract for 4,500 gal.

Name of Customer	Advancements by Goldenrod	Security for Loan
Senger Liquor	$25.00	Contract for 1 yr.
Henry's Food & Meats	None	
Frank Rapciak	None	
George's School Store	$300.00	Contract for 2 yrs.
Victor Food Mart	None	
Joe's Confectionery	$50.00	Contract for 500 gal.
Royal Blue Store	$100.00	Contract for 3 yrs.
John's Grocery	$50.00	Contract for 500 gal.
Ray's Grocery	$100.00	Contract for 1,000 gal.
Morini's Food Shop	$50.00	Contract for 500 gal.
Grocerland Food Mart	$750.00	Contract for 7,500 gal.
Nick & Ruth's Food Shop	$45.00	Contract for 450 gal.
George's All State Foods	$100.00	Contract for 1,000 gal.
Pearl Bennett	$100.00	Note
S & S Liquors	$50.00	Contract for 500 gal.
39 Nick Welch	$100.00	Contract for 1,000 gal.
Smith's Grocery & Market	None	
Rose's Bakery & Delicatessen	$100.00	Contract for 1,000 gal.
Glowacki Pharmacy	$50.00	Contract for 500 gal.
Fanning's Food Shop	$100.00	Contract for 1,000 gal.
John's Bar B Q & Grill	None	
Franklin's Food Store	$50.00	Contract for 500 gal.
Central Super Market	$100.00	Contract for 1,000 gal.
Ray Kucharski	$100.00	Contract for 1,000 gal.
Dick's Food Shop	$75.00	Contract for 750 gal.
Richard Willis	$125.00	Note and Contract for 1,250 gal.
Nelson's Food Mart	$200.00	Contract for 3 yrs.
Simon Fiscella	$100.00	Contract for 1,000 gal.
Di Santis Food Shop	$100.00	Contract for 1,000 gal.

Name of Customer	Advancements by Goldenrod	Security for Loan
Joe's Grocery & Meat Market	None	
Joe's & Jerry's Grocery	$200.00	Contract for 2,000 gal.
Angelo Silveri	None	
Prisco's Grocery	$100.00	Contract for 1,000 gal.
People's Food Mart, Inc.	None	
Ann Bruno	$100.00	Contract for 1,000 gal.
Marie's Food Shop	$150.00	Contract for 1,500 gal.
40 Franklin Avenue · Certified	$500.00	Contract for 5,000 gal.
Margaret's Dairy Store	$100.00	Contract for 1,000 gal.
Des Plaines Market & Locker Service, Inc.	$100.00	Contract for 1,000 gal.
Norrine's Grocery	$50.00	Contract for 500 gal.
Foodland	$400.00	Contract for 4,000 gal.
Progressive Grocery & Meat Market	$100.00	Contract for 1,000 gal.
Stein Bros. Food Mart	$500.00	Note and Contract for 5,000 gal.
Mary Chorvat	None	
Lor-A-Lee Sausage Shop	$150.00	Contract for 1,500 gal.
Lotshaw Drugs	$200.00	Contract for 2,000 gal.
Pettas' Food Shop	$100.00	Contract for 1,000 gal.
Casey's Food Store	$200.00	Contract for 2,000 gal.
William Majka	$50.00	Contract for 500 gal.
Albert Foods	$100.00	Contract for 1,000 gal.
Hi-Way Bar B Q	None	
Earl's Food Mart	$100.00	Contract for 1,000 gal.
Division-Wells Food Mart	$100.00	Contract for 1,000 gal.
Napoli's Spotlite	None	
Para Food Shop	$100.00	Contract for 1,000 gal.
41 Klein's Bakery	$50.00	Contract for 500 gal.

Name of Customer	Advancements by Goldenrod	Security for Loan
Pattay Food Shop	$75.00	Contract for 750 gal.
Lemanski Food Shop	$50.00	Co .tract for 500 gal.
Gassman's IGA Food Mart	$350.00	Contract for 3,500 gal.
Spiro Kokinis	$50.00	Contract for 500 gal.
Boomkers IGA	$100.00	Contract for 1,000 gal.
Spanos Open Air Supermart	None	
Lillian's Food Mart	$200.00	Contract for 2,000 gal.
Colmado Puerto Rico	None	
Campo's Lunch Room	None	
J & J Food Mart	$200.00	Contract for 2,000 gal.
New James Rest.	None	
Aleck Machek	None	
Rose's Food Mart	$100.00	Contract for 1,000 gal.
Rocco Boezio	None	
Nager Food Mart	$50.00	Contract for 500 gal.
Bea's Food Mart	$50.00	Contract for 500 gal.
Harrington Food Mart	$50.00	Contract for 500 gal.
Miller's Certified Food Mart	$150.00	Contract for 1,500 gal.
Busch Super IGA Market	$1,500.00	Contract for 15,000 gal.
Carnival Food Mart	$300.00	Contract for 3,000 gal.

Exhibit 2.

Continued from previous page.

TABLE 3.

CLASSIFICATION OF PRODUCER MILK RECEIPTS AND THE PERCENTAGES OF THE TOTAL IN EACH CLASS AS USED IN THE COMPUTATION OF UNIFORM PRICE UNDER FEDERAL ORDER 41
JANUARY, 1951 - MARCH, 1956

Year and Month	Class I Milk		Class II Milk		Class III Milk		Class IV Milk		Total Producer Milk Receipts (100%)
	pounds	percent	pounds	percent	pounds	percent	pounds	percent	pounds
1955									
Jan.	182,863,633	47.9	58,474,088	15.3	24,316,285	6.4	115,723,268	30.4	381,377,274
Feb.	169,338,001	47.2	53,649,340	15.0	25,070,538	6.9	110,569,251	30.9	358,627,130
Mar.	189,275,874	47.3	61,229,078	15.3	31,657,054	7.9	118,327,209	29.5	400,489,215
Apr.	184,338,236	46.5	64,111,996	16.2	18,622,670*	4.7*	129,197,446	32.6	396,270,348
May	180,569,347	40.2	77,068,135	17.2	28,080,290*	6.3*	163,017,255	36.3	448,735,027
June	178,170,907	43.6	89,032,991	21.8	24,442,639*	6.0*	117,144,850	28.6	408,791,387
July	183,340,829	50.7	74,540,503	20.6	11,617,957*	3.2*	92,068,022	25.5	361,567,311
Aug.	198,505,047	61.8	65,577,260	20.4	15,286,918	4.8	41,975,873	13.0	321,345,098
Sept.	207,984,640	68.2	56,843,552	18.6	15,096,997	4.9	25,236,003	8.3	305,161,192
Oct.	206,097,317	63.2	55,402,013	17.0	19,374,852	5.9	45,286,286	13.9	326,160,468
Nov.	197,704,804	60.4	58,457,703	17.9	20,744,996	6.3	50,364,378	15.4	327,271,881
Dec.	198,316,166	54.0	66,271,477	18.0	24,424,940	6.7	78,312,915	21.3	367,325,498
Average	189,708,733	51.7	65,054,845	17.7	21,561,345	5.9	90,601,896	24.7	366,926,819
1956									
Jan.	190,796,502	48.1	60,955,377	15.4	23,140,368	5.8	121,737,190	30.7	396,629,437
Feb.	183,375,093	47.2	60,565,315	15.6	22,041,141	5.7	122,113,089	31.5	388,094,638
Mar.	199,170,766	47.7	67,846,998	16.2	25,478,520	6.1	125,336,289	30.0	417,832,573

NOTE: In some instances, Class III and/or Class IV data are shown with a minus sign, this is due to a minus Class III or Class IV milk figure necessary to balance and reconcile the total pounds classified with the actual pounds of milk received from producers. Reconciliation was made at the Class IV price at all times prior to March 1, 1950, subsequently, it has been made at the lowest of the class prices, which specifically may be either the Class IV price or the condensery-pay-price, the latter when used is shown by asterisk.

Compiled from reports submitted by handlers to the Market Administrator, Chicago, Illinois.

Continued from previous page.

TABLE 8. AVERAGE BUTTERFAT TESTS OF PRODUCER MILK DELIVERIES UNDER FEDERAL ORDER 41, BY ZONE GROUPS AND ENTIRE MARKET BY MONTHS, JANUARY, 1951 – MARCH, 1956

Year and Month	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zones 6–9	Zones 10–14	Zones 15–22	Entire Market
	percent	percent	percent	percent	percent	percent	percent	percent	percent
1955									
Jan.	3.68	3.64	3.64	3.54	3.60	3.54	3.64	3.76	3.62
Feb.	3.67	3.63	3.62	3.53	3.59	3.52	3.60	3.76	3.61
Mar.	3.64	3.60	3.59	3.51	3.57	3.50	3.59	3.83	3.59
Apr.	3.58	3.56	3.54	3.46	3.53	3.45	3.55	3.75	3.54
May	3.53	3.53	3.51	3.45	3.51	3.48	3.58	3.84	3.52
June	3.48	3.50	3.50	3.41	3.48	3.47	3.59	3.81	3.50
July	3.46	3.49	3.50	3.42	3.50	3.48	3.57	3.83	3.49
Aug.	3.47	3.50	3.52	3.44	3.52	3.50	3.61	3.90	3.51
Sept.	3.54	3.60	3.60	3.56	3.62	3.63	3.77	4.05	3.61
Oct.	3.69	3.72	3.73	3.68	3.73	3.71	3.85	4.06	3.73
Nov.	3.74	3.74	3.73	3.67	3.73	3.67	3.81	3.93	3.73
Dec.	3.74	3.72	3.72	3.65	3.69	3.63	3.77	3.88	3.71
Average	3.60	3.60	3.60	3.53	3.59	3.55	3.66	3.87	3.60
1956									
Jan.	3.67	3.64	3.66	3.60	3.63	3.57	3.69	3.82	3.65
Feb.	3.65	3.60	3.62	3.55	3.58	3.54	3.64	3.79	3.61
Mar.	3.65*	3.61*	3.62*	3.55*	3.58*	3.55*	3.65*	3.85*	3.61*

* Reported data.

Compiled from Handlers' Audited Producer Payrolls.

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TABLE 9. NUMBER OF PRODUCERS DELIVERING MILK TO PLANTS UNDER ORDER 41, BY ZONE GROUPS AND ENTIRE MARKET BY MONTHS, JANUARY, 1951 - MARCH, 1956

Year and Month	Zone 1	Zone 2	Zone 3	Zone 4	Zone 5	Zones 6-9	Zones 10-14	Zones 15-22	Entire Market
1951									
Jan.	8,888	1,912	2,235	1,507	1,913	3,191	2,247	1,468	23,361
Feb.	8,814	1,902	2,221	1,504	1,903	3,204	2,241	1,451	23,240
Mar.	8,739	1,902	2,187	1,499	1,847	3,208	2,232	1,428	23,042
Apr.	8,629	1,892	2,156	1,490	1,823	3,194	2,228	1,423	22,835
May	8,603	1,889	2,130	1,507	1,810	3,181	2,207	1,415	22,742
June	8,560	1,880	2,127	1,527	1,817	3,188	2,205	1,416	22,720
July	8,927	1,874	2,121	1,531	1,814	3,170	2,213	1,420	23,070
Aug.	8,833	1,878	2,124	1,531	1,899	3,178	2,211	1,428	23,082
Sept.	8,838	1,881	2,132	1,543	1,898	3,185	2,211	1,428	23,106
Oct.	8,806	1,876	2,125	1,549	1,891	3,198	2,212	1,433	23,090
Nov.	8,560	1,862	2,246	1,552	1,877	3,205	2,195	1,431	22,928
Dec.	8,508	1,859	2,253	1,592	1,793	3,225	2,182	1,437	22,846
Average	8,725	1,884	2,170	1,528	1,857	3,194	2,215	1,432	23,005
1952									
Jan.	8,479	1,857	2,254	1,548	1,797	3,300	2,181	1,437	22,844
Feb.	8,411	1,846	2,240	1,478	1,920	3,221	2,072	1,437	22,625
Mar.	8,349	1,856	2,224	1,498	1,923	3,259	2,070	1,435	22,614
Apr.	8,332	1,835	2,208	1,491	1,919	3,251	2,069	1,441	22,546
May	8,358	1,792	2,208	1,517	1,963	3,242	2,069	1,432	22,581
June	8,359	1,797	2,253	1,528	1,937	3,261	2,067	1,429	22,631
July	8,349	1,791	2,254	1,529	1,934	3,266	2,056	1,428	22,607
Aug.	8,249	1,786	2,239	1,534	2,044	3,290	2,061	1,411	22,614
Sept.	8,251	1,790	2,209	1,542	2,049	3,331	2,062	1,415	22,649
Oct.	8,256	1,794	2,224	1,555	2,053	3,410	2,085	1,393	22,770
Nov.	8,225	1,789	2,242	1,582	2,065	3,489	2,115	1,404	22,911
Dec.	8,249	1,797	2,249	1,607	2,101	3,605	2,152	1,424	23,184
Average	8,322	1,811	2,234	1,534	1,975	3,327	2,088	1,424	22,715
1953									
Jan.	8,273	1,804	2,293	1,621	2,129	3,727	2,187	1,447	23,481
Feb.	8,260	1,816	2,318	1,670	2,120	3,832	2,210	1,462	23,688
Mar.	8,278	1,816	2,322	1,661	2,143	3,917	2,237	1,473	23,847
Apr.	8,281	1,810	2,359	1,673	2,169	3,943	2,242	1,469	23,946
May	8,275	1,807	2,383	1,681	2,177	3,951	2,246	2,458	23,978
June	8,240	1,806	2,331	1,676	2,229	3,961	2,250	1,454	23,947
July	8,247	1,751	2,293	1,661	2,280	3,948	2,236	1,422	23,838
Aug.	8,246	1,759	2,289	1,671	2,272	3,972	2,232	1,429	23,870
Sept.	8,265	1,770	2,304	1,669	2,274	3,988	2,162	1,436	23,868
Oct.	8,244	1,773	2,319	1,676	2,300	4,029	2,175	1,444	23,960
Nov.	8,207	1,808	2,347	1,695	2,316	4,086	2,186	1,463	24,100
Dec.	8,147	1,812	2,355	1,733	2,317	4,133	2,194	1,465	24,156
Average	8,247	1,796	2,326	1,674	2,227	3,957	2,213	1,452	23,890
1954									
Jan.	8,098	1,808	2,413	1,755	2,359	4,172	2,177	1,472	24,220
Feb.	8,056	1,815	2,377	1,765	2,344	4,195	2,165	1,470	24,208
Mar.	8,026	1,822	2,379	1,776	2,368	4,216	2,152	1,366	24,107
Apr.	7,986	1,813	2,356	1,781	2,352	4,187	2,027	1,344	23,846
May	7,944	1,795	2,365	1,780	2,357	4,196	2,020	1,217	23,674
June	7,933	1,791	2,337	1,786	2,363	4,190	2,010	1,213	23,623
July	7,931	1,789	2,315	1,783	2,325	4,183	1,995	1,208	23,529
Aug.	7,906	1,789	2,315	1,791	2,283	4,159	1,988	1,278	23,509
Sept.	7,939	1,737	2,298	1,781	2,271	4,144	1,967	1,226	23,363
Oct.	7,863	1,729	2,287	1,784	2,268	4,136	1,950	1,229	23,246
Nov.	7,777	1,745	2,264	1,779	2,257	4,106	1,927	1,200	23,055
Dec.	7,736	1,736	2,274	1,781	2,253	4,099	1,916	1,161	22,925
Average	7,930	1,781	2,332	1,778	2,317	4,165	2,024	1,282	23,609

Continued on next page.

Exhibit 2-B.

TABLE 29. POUNDS OF BUTTERFAT CONTAINED IN FROZEN CREAM, FLUID CREAM, AND TOTAL BUTTERFAT UTILIZED IN ICE CREAM, ICE CREAM MIX, AND FROZEN DESSERTS BY ORDER 41 HANDLERS, BY MONTHS, JANUARY, 1951 - MARCH, 1956

Year and Month	Source of Butterfat in Ice Cream Mix		Total	
	Frozen Cream	Fluid Cream and Other Products		
	butterfat pounds	butterfat pounds	butterfat pounds	3.5% milk equivalent
1951				
Jan.	75,548	555,994	631,542	18,044,057
Feb.	37,350	483,877	521,227	14,892,200
Mar.	34,653	694,188	728,841	20,824,029
Apr.	16,874	715,626	732,500	20,928,572
May	-0-	1,003,716	1,003,716	28,677,600
June	-0-	921,347	921,347	26,324,200
July	250,123	768,195	1,018,318	29,094,800
Aug.	377,840	539,629	917,469	26,213,400
Sept.	330,024	433,983	764,007	21,828,771
Oct.	302,108	415,749	717,857	20,510,200
Nov.	263,078	295,692	558,770	15,964,857
Dec.	205,871	405,815	611,686	17,476,743
Average	157,789	602,818	760,607	21,731,619
1952				
Jan.	177,680	458,990	636,670	18,190,571
Feb.	65,447	549,259	614,706	17,563,029
Mar.	40,900	619,382	660,282	18,865,200
Apr.	21,625	757,409	779,034	22,258,114
May	75	806,445	806,520	23,043,430
June	-0-	1,042,827	1,042,827	29,795,057
July	294,770	736,100	1,030,870	29,453,429
Aug.	311,224	488,189	799,413	22,840,371
Sept.	347,380	407,189	754,569	21,559,114
Oct.	305,295	276,605	581,900	16,625,714
Nov.	324,759	218,148	542,907	15,511,629
Dec.	298,404	306,731	605,135	17,289,571
Average	182,297	555,606	737,903	21,082,956
1953				
Jan.	175,263	355,572	530,835	15,166,715
Feb.	138,071	386,002	524,073	14,973,515
Mar.	90,382	553,972	644,354	18,410,114
Apr.	43,911	580,729	624,640	17,846,858
May	6,029	759,103	765,132	21,860,914
June	2,875	983,350	986,225	28,177,857
July	197,492	765,514	963,006	27,514,456
Aug.	310,992	561,366	872,358	24,924,514
Sept.	314,635	475,420	790,055	22,573,000
Oct.	232,271	371,075	603,346	17,238,457
Nov.	184,992	359,763	544,755	15,564,429
Dec.	96,630	464,982	561,612	16,046,057
Average	149,462	551,404	700,866	20,024,741
1954				
Jan.	22,465	519,457	541,922	15,483,486
Feb.	23,025	548,272	571,297	16,322,771
Mar.	-0-	619,312	619,312	17,694,629
Apr.	31,622	667,314	698,936	19,969,600
May	-0-	777,574	777,574	22,216,400
June	1,675	1,108,571	1,110,246	31,721,314
July	59,998	884,944	944,942	26,998,343
Aug.	178,448	711,372	889,820	25,423,429
Sept.	199,819	590,211	790,030	22,572,286
Oct.	130,889	524,276	655,165	18,719,000
Nov.	161,043	504,351	665,394	18,439,829
Dec.	59,779	544,939	604,718	17,277,657
Average	70,730	666,716	737,446	21,069,895

Year and Month	Source of Butterfat in Ice Cream Mix		Total	
	Frozen Cream	Fluid Cream and Other Products		
	butterfat pounds	butterfat pounds	butterfat pounds	3.5% milk equivalent
1955				
Jan.	8,300	624,921	633,221	18,092,029
Feb.	1,849	561,300	563,149	16,089,972
Mar.	-0-	701,056	701,056	20,030,172
Apr.	563	790,177	790,740	22,592,571
May	-0-	905,315	905,315	25,866,143
June	4,600	990,125	994,725	28,420,715
July	18,760	1,110,864	1,129,624	32,274,971
Aug.	392,213	776,447	1,168,660	33,390,286
Sept.	234,153	565,456	799,609	22,845,971
Oct.	179,739*	474,997*	654,736*	18,706,743*
Nov.	183,257*	447,746*	631,003*	18,028,657*
Dec.	40,774*	581,871*	622,645*	17,789,856*
Average	84,684*	710,856*	799,540*	22,844,007*
1956				
Jan.	11,969*	684,903*	696,872*	19,910,629*
Feb.	-0- *	723,788*	723,788*	20,679,658*
Mar.	-0- *	804,336*	804,336*	22,981,028*

* Reported data.

Compiled from Handlers' Audited Utilization Reports.

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TABLE 30. POUNDS OF BUTTERFAT CONTAINED IN FROZEN CREAM IN APPROVED WAREHOUSES AND ITS UTILIZATION UNDER ORDER 41, BY MONTHS, JANUARY, 1951 - MARCH, 1956

Year and Month	Opening Inventory	Adjustment to Inventory	Into Storage	Sub Total	Utilized by Order 41 Handlers						Closing Inventory
					Class I	Class II	Class III	Class IV	Sales to Non-handlers	Total Sales and Use	
	pounds	pounds	pounds	pounds	pounds	pounds	pounds	pounds	pounds	pounds	pounds
1951											
Jan.	130,173	-0-	18,789	148,962	-0-	75,548	-0-	-0-	-0-	75,548	73,414
Feb.	73,414	-0-	12,592	86,006	-0-	37,350	-0-	-0-	4,513	41,863	44,143
Mar.	44,143	-1	8,899	53,041	-0-	34,653	-0-	-0-	1,514	36,167	16,874
Apr.	16,874	-0-	16,888	33,762	-0-	16,874	-0-	-0-	-0-	16,874	16,888
May	16,888	-0-	876,509	893,397	-0-	-0-	-0-	-0-	-0-	-0-	893,397
June	893,397	-0-	1,159,231	2,052,628	-0-	-0-	-0-	-0-	-0-	-0-	2,052,628
July	2,052,628	155	1,783	2,054,566	-0-	250,123	-0-	-0-	750	250,873	1,803,693
Aug.	1,803,693	-0-	-0-	1,803,693	-0-	377,840	-0-	-0-	1,775	379,615	1,424,078
Sept.	1,424,078	380	-0-	1,424,458	-0-	330,004	-0-	675	-0-	330,699	1,093,759
Oct.	1,093,759	808	-0-	1,094,567	-0-	302,108	-0-	3,990	-0-	306,098	788,469
Nov.	788,469	-461	-0-	788,008	-0-	263,078	-0-	7,655	-0-	270,733	517,275
Dec.	517,275	-0-	-0-	517,275	-0-	205,871	-0-	4,952	-0-	210,823	306,452
Totals			2,094,691		-0-	1,893,469	-0-	17,272	8,552	1,919,293	
1952											
Jan.	306,452	-26	8,316	314,742	-0-	177,680	-0-	5,087	-0-	182,767	131,975
Feb.	131,975	-0-	-0-	131,975	-0-	65,447	-0-	4,003	-0-	69,450	62,525
Mar.	62,525	-0-	-0-	62,525	-0-	40,900	-0-	-0-	-0-	40,900	21,625
Apr.	21,625	-50	12,775	34,350	-0-	21,625	-0-	-0-	175	21,800	12,550
May	12,550	13	850,957	863,520	-0-	75	-0-	-0-	-0-	75	863,445
June	863,445	-12	1,500,267	2,363,700	-0-	-0-	-0-	-0-	-0-	-0-	2,363,700
July	2,363,700	-0-	323	2,364,023	-0-	294,770	-0-	-0-	-0-	294,770	2,069,253
Aug.	2,069,253	-0-	311	2,069,564	35	311,226	-0-	-0-	-0-	311,261	1,758,303
Sept.	1,758,303	-0-	-0-	1,758,303	34	347,380	-0	950	-0-	348,364	1,409,939
Oct.	1,409,939	112	-0-	1,410,051	-0-	305,295	-0-	4,112	-0-	309,407	1,100,644
Nov.	1,100,644	15	-0-	1,100,659	37	324,759	-0-	-0-	-0-	324,796	775,863
Dec.	775,863	31	-0-	775,894	-0-	298,404	-0-	4,678	25	303,107	472,787
Totals			2,372,949		106	2,187,561	-0-	18,830	200	2,206,697	
1953											
Jan.	472,787	-500	-0-	472,287	-0-	175,263	-0-	728	81	176,072	296,215
Feb.	296,215	-0-	-0-	296,215	-0-	138,071	-0-	5,420	49	143,540	152,675
Mar.	152,675	3	-0-	152,678	-0-	90,382	-0-	12,181	175	102,738	49,940
Apr.	49,940	-0-	2,525	52,465	-0-	43,911	-0-	-0-	-0-	43,911	8,554
May	8,554	-0-	284,228	292,782	-0-	6,029	-0-	-0-	-0-	6,029	286,753
June	286,753	24	1,184,174	1,470,951	-0-	2,875	-0-	-0-	475	3,350	1,467,601
July	1,467,601	-25	-0-	1,467,576	-0-	197,492	-0-	50	-0-	197,542	1,270,034
Aug.	1,270,034	-1	598	1,270,631	93	310,992	4,400	2,500	-0-	317,985	952,646
Sept.	952,646	50	-0-	952,696	-0-	314,635	5,800	2,550	27	323,012	629,684
Oct.	629,684	-0-	-0-	629,684	-0-	232,271	4,775	1,475	-0-	238,521	391,163
Nov.	391,163	1	-0-	391,164	-0-	184,992	6,918	375	5,510	197,795	193,369
Dec.	193,369	-0-	-0-	193,369	-0-	96,630	4,881	4,400	31,533	137,444	55,925
Totals			1,471,525		93	1,793,543	26,774	29,679	37,850	1,887,939	
1954											
Jan	55,925	-0-	-0-	55,925	-0-	22,465	160	3,875	1,700	28,200	27,725
Feb.	27,725	50	-0-	27,775	-0-	23,025	-0-	-0-	4,750	27,775	-0-
Mar.	-0-	-0-	31,622	31,622	-0-	0-	-0-	-0-	-0-	-0-	31,622
Apr.	31,622	-0-	-0-	31,622	-0-	31,622	-0-	-0-	-0-	31,622	-0-
May	-0-	-0-	211,081	211,081	-0-	-0-	-0-	-0-	-0-	-0-	211,081
June	211,081	-0-	575,168	786,249	-0-	1,675	-0-	-0-	1,050	2,725	783,524
July	783,524	-36	7,675	791,143	-0-	59,998	-0-	-0-	-0-	59,998	731,145
Aug.	731,145	-41	2,350	733,454	-0-	178,448	-0-	-0-	-0-	178,448	555,006
Sept.	555,006	-39	-0-	554,967	-0-	199,819	-0-	-0-	-0-	199,819	355,148
Oct.	355,148	-0-	-0-	355,148	-0-	130,889	-0-	3,575	-0-	134,464	220,684
Nov.	220,684	-0-	-0-	220,684	-0-	141,043	1,125	4,550	-0-	146,718	73,966
Dec.	73,966	-0-	-0-	73,966	-0-	59,779	2,125	1,350	-0-	63,254	10,712
Totals			827,896		-0-	848,763	3,410	13,350	7,500	873,023	

Continued on next page.

47 Exhibit 3.

Proportion of Total Butterfat Received in Chicago Milk Marketing Area Utilized by the Parties and by the Ice Cream Industry, in Calendar Year 1955. (Source: Tables 29, 3, and 8 of June, 1956, Statistical Compilation by Federal Milk Market Administrator; and the Parties' Records.)

Total in Market

lbs.	%
158,512,385	100.0

Total Utilized
By Ice Cream Manufacturers

lbs.	%
9,594,483	6.052

Portion of Total in Market
Utilized by Parties
Goldenrod

lbs.	%
716,698	0.452

Central

lbs.	%
510,319	0.322

48 Exhibit 3A.

Proportion of Total Butterfat Allocated to Ice Cream Manufacturers in Chicago Milk Marketing Area Utilized by the Parties in Calendar Year 1955 (Source: Table 29 of June 1956 Statistical Compilation by Federal Milk Market Administrator; and the Parties' Records.)

Central		Goldenrod		All Ice Cream Manufacturers	
lbs.	%	lbs.	%	lbs.	%
510,319	5.318	716,698	7.468	9,594,483	100.0

49 Exhibit 3B.

Proportion of Goldenrod's Sales to Fred Harvey, to Total Butterfat Allocated to Ice Cream Manufacturers and to Total Butterfat Received in Chicago Milk Marketing Area, in Calendar Year 1955. (Source: Table 29 of June, 1956 statistical compilation by Federal Milk Market Administrator; and Goldenrod's records.)

	Fred Harvey Commissary		Fred Harvey Other		All Ice Cream Manufacturers	
	lbs.	%	lbs.	%	lbs.	%
	9,147	0.095	25,757	0.268	9,594,483	100.0
% to total butterfat reaching market		0.005		0.016		6.052

50 Exhibit 4.

(Letterhead of Highlander Central Ice Cream Co., Chicago 9, Ill.)

January 3, 1955

Schedule of Prices Effective Monday, January 10, 1955.

Effective Monday, January 10, 1955 the following prices will prevail:

Packaged Ice Cream:		Suggested Retail Price
Pints, Ice Cream	1.78 per gallon	27¢ per Pint
Pints, Sherbet	1.60 per gallon	27¢ per Pint
Pints, Bonnie Maid	1.30 per gallon	21¢ per Pint
½ Gal., Ice Cream	1.65 per gallon	95¢ per ½ Gal.
½ Gal., Bonnie Maid	1.30 per gallon	79¢ per ½ Gal.
Diced Cream:		
Diced Cream (40 Pak Gallon)	1.90 per gallon	
Diced Sherbet (40 Pak Gallon)	1.90 per gallon	
Diced Milk (Vanilla Special)	1.60 per gallon	
Diced Cream (Fourpaks)	1.90 per gallon	25¢ per 4 Pak
Diced Sherbet (Fourpaks)	1.90 per gallon	25¢ per 4 Pak

The following discount schedule on the above packaged goods will be in effect.

Discount Schedule	Per Gallon
25-49 gals. per month	4¢
50-109 gals. per month	8¢
110-159 gals. per month	10¢
160 gals. and over	12¢

Discounts will be computed monthly and payable semi-annually. Discount checks will be payable April 15th and October 15th covering the previous six (6) month period. Bulk Products:

Ice Cream	1.70 per gallon net
Sherbet	1.50 per gallon net
Vanilla Special	1.50 per gallon net

Customers owning and servicing their own equipment will be allowed 10¢ per gallon payable semi-annually.

Prices of r elties will remain the same except the Dietetic Cups that will be adjusted to $1.39 per dozen.

51 Our suggested retail prices as quoted above are recommended so that you can obtain the maximum volume sales in ice cream. It is suggested to the dealer that the discount schedule be taken into consideration when establishing the retail price.

The above price adjustments will become effective Monday, January 10, 1955. Therefore we strongly urge our dealers to stock their cabinets to the fullest capacity in order to take advantage of the present prices.

We wish to take this opportunity to thank you in advance for your co-operation and assistance and sincerely wish you a very happy and Prosperous New Year.

Central Ice Cream Company

52 Exhibit 5.

Goldenrod Ice Cream Co.

Wholesale Price Schedule Effective January 10, 1955.

Bulk

Goldenrod Ice Cream, 2½ and 5 gallon containers	$1.78 per gallon
Goldenrod Sherbet, 2½ and 5 gallon containers	1.58 per gallon
Goldenrod Confection, 2½ and 5 gallon containers	1.38 per gallon
Goldenrod French Ice Cream, 2½ and 5 gallon containers	2.30 per gallon

Quantity discounts will be computed monthly and paid semi-annually on the basis of your purchases of bulk ice cream, bulk sherbet and bulk confection in 2½ gallon (or larger) containers only, as follows:

Bulk Purchased in Any One Month

40 to 59 gallons	5¢ per gallon
60 to 69 gallons	6¢ per gallon
70 to 79 gallons	7¢ per gallon
80 to 89 gallons	8¢ per gallon
90 to 99 gallons	9¢ per gallon
100 to 119 gallons	10¢ per gallon
120 to 139 gallons	12¢ per gallon
140 to 159 gallons	14¢ per gallon
160 to 179 gallons	16¢ per gallon
180 to 199 gallons	18¢ per gallon
200 and over gallons	20¢ per gallon

Packages

		Suggested Retail Prices
Goldenrod Ice Cream Pints	$1.78 per gallon	30¢ per pint
Goldenrod Sherbet Pints	1.58 per gallon	26¢ per pint
Goldenrod French Ice Cream Pints	2.30 per gallon	40¢ per pint
Goldenrod Frozen Treat	1.30 per gallon	21¢ per pint
Goldenrod Ice Cream Half-gallons	1.65 per gallon	
Home Town Half-gallons	1.40 per gallon	
Goldenrod Ice Cream 2/5 Gallons (Unit of three 2/5 cartons)	1.98 per Unit	

Quantity discounts will be computed monthly and paid semi-annually on the basis of your purchases of Goldenrod Ice Cream Pints, ½ Gallons and 2/5 Gallons, Goldenrod Sherbet Pints, Goldenrod Frozen Treat Pints, Goldenrod French Ice Cream Pints, and Home Town ½ Gallons only, as follows:

Packages Purchased in Any One Month

40 to 50 gallons	2¢ per gallon
51 to 109 gallons	4¢ per gallon
110 to 169 gallons	6¢ per gallon
170 gallons and over	8¢ per gallon

All other prices remain unchanged.

Equipment Allowance

There will be no change in the dealer owned and maintained equipment allowance, which will be computed monthly and paid semi-annually.

53 Exhibit 6.

Prices (Net) Received by Goldenrod on 101 Accounts—Showing Whether the Dealer (Retailer) Owned His Cabinets or Whether Goldenrod Furnished Same.

Accounts	Price per Gallon	
1	$1.45	Dealer owns Equipment
1	1.46	Goldenrod furnished Equipment
2	1.48	Goldenrod furnished Equipment
1	1.50	Dealer owns Equipment
1	1.50 to 1.58	Goldenrod furnished Equipment
7	1.50 to 1.58	Dealer owns Equipment
1	1.56	Goldenrod furnished Equipment
1	1.58	Goldenrod furnished Equipment
1	1.60	Goldenrod furnished Equipment
2	1.60 to 1.68	Dealer owns Equipment
59	1.60 to 1.68	Goldenrod furnished Equipment
24	1.70 to 1.78	Goldenrod furnished Equipment
101		

APPENDIX VI.

THE OPINION OF THE COURT OF APPEALS OF WHICH REVIEW IS PRESENTLY SOUGHT, 287 F. 2d 265.

February 8, 1961.

Before SCHNACKENBERG, KNOCH and CASTLE, *Circuit Judges*.

CASTLE, *Circuit Judge*. Central Ice Cream Company, plaintiff-appellant, prosecutes this appeal from the judgment order of the District Court granting judgment for the defendant in an action brought by Central against Golden Rod Ice Cream Company, defendant-appellee. Central seeks treble damages for unlawful price discrimination. Following our remandment of this cause on a previous appeal, *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 7 Cir., 257 F. 2d 417, the District Court severed the issue of liability from the issue of damages and the issue of liability was tried by the court on a stipulation. The District Court's findings of fact and conclusions of law appear in its opinion reported at 184 F. Supp. 312.

This appeal presents no dispute as to the facts. Central contends that the District Court erred as a matter of law. Inasmuch as the facts involved are set forth in detail in the District Court's opinion we do not attempt to restate them in full.

Central relies for relief exclusively upon Section 2 of the Clayton Act as amended by Section 1 of the Robinson-Patman Act, 15 U.S.C.A. §13(a)-(f).

Central and Golden Rod are competing manufacturers and vendors of ice cream to retailers in the Chicago area. Both operate ice cream manufacturing plants in Illinois. Each uses ingredients, principally butterfat, coming from milk originating in Wisconsin and Illinois. Golden Rod purchased all butterfat it used in the manufacture of ice cream from brokers located in Chicago and a substantial part came from milk originating in Wisconsin and Illinois. Central sells 99.975% of its ice cream to Illinois retailers

and .025¢ to Indiana retailers. Golden Rod sells and delivers its ice cream and other frozen desserts solely within the State of Illinois; it has no ice cream business of any kind or nature outside of Illinois. Golden Rod does sell and deliver ice cream to Fred Harvey, a corporation. The ice cream sold and delivered to Harvey is of different and higher grade and quality than that sold by Golden Rod to its other customers and is made to Harvey's special formula. All the sales and deliveries to Harvey are made at Chicago. A small portion of the total sales Golden Rod makes to Harvey is resold by Harvey to a railroad and used in the dining cars of the railroad operating in interstate commerce.[1]

The District Court found and concluded, *inter alia*, that there was no price discrimination in the course of interstate commerce. In so far as the finding rests on factual considerations we are of the opinion that it is fully supported by the record and free from error. We are convinced that in reaching the legal conclusion it did the District Court applied the correct legal criteria.

The statute upon which Central predicates liability, 15 U.S.C.A. §13(a), provides:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different *purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce*, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent com-

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[1] Central's complaint had alleged that Golden Rod sold very substantial quantities of its ice cream to Harvey, delivered to Harvey at Chicago railroad depots, and inferred that a large portion of such ice cream was used by Harvey in the operation of dining car concessions on interstate trains.

petition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . ." (emphasis supplied)

By the express terms of the statute it is essential to establish a violation that the discrimination in price be between purchasers of commodities of "like grade and quality" *and* that at least one of the purchases "involved in such discrimination" be a purchase in interstate commerce. The concurrence of these requisite factors is lacking in the instant case. The only sales of like grade and quality were solely in intrastate commerce—a fact not appearing from the complaint but disclosed by the stipulated proof. This fact serves to distinguish the instant case from *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115, primarily relied upon by Central.

In *Moore* the corporation charged with violating 15 U.S.C.A. §13 was engaged in the baking business at Clovis, New Mexico and sold bread to retailers in Santa Rosa, New Mexico and in Farwell, Texas, a town which it served with a bread truck operating out of Clovis. It cut its prices of bread in Santa Rosa where it was in competition with the petitioner, Moore, a local baker. But it did not cut its prices of bread in Farwell, Texas. It is evident that in *Moore* the requisite elements to establish a violation were present. Purchases involved in the discrimination were in interstate commerce. Interstate sales of like grade and quality were discriminated against. The higher prices were maintained as to Farwell purchasers.

Central also relies heavily upon *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207 and *United States* v. *Employing Plasterers Association*, 347 U. S. 186. But these are Sherman Act cases and their teachings are not determinative of the question here involved—whether the particular combination of elements requisite to a violation of 15 U.S.C.A. §13(a)-(f) were present.

In view of the conclusion we have reached on the issue discussed we do not deem it necessary to consider the additional findings and conclusions relied upon by the District Court in support of its judgment. The judgment order of the District Court is affirmed.

AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX VII.

THE DISTRICT COURT'S ORIGINAL MEMORANDUM AND ORDER OF JULY 22, 1957, REPORTED 153 FED. SUP. 684, REVERSED BY THIS COURT, APRIL 22, 1958, 257 FED. (2d) 417.

CAMPBELL, *District Judge.*

Plaintiff, Central Ice Cream Company, an Illinois Corporation, brings this suit against Golden Rod Ice Cream Company, an Illinois Corporation, alleging conduct by defendant company damaging plaintiff's business in violation of the Sherman Anti-Trust Act (15 U. S. C. A. § 1), the Clayton Act (15 U. S. C. A. § 13), the Robinson-Patman Act (15 U. S. C. A. §§ 13a and 13b), the Civil Rights Act (42 U. S. C. A. § 1985(3)) and the National School Lunch Act (42 U. S. C. A. § 1753). The complaint prays for temporary and permanent injunctions and for damages. Defendant has filed its motion to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to state a claim.

The complainant alleges that plaintiff is an ice cream manufacturer in Illinois; that it "imports a very substantial part of its milk, cream and other ingredients from Wisconsin and other states in inter-state commerce, transforms them into ice cream in Illinois and sells this ice cream very extensively both in Illinois and in other states"; that defendant is engaged in manufacture of ice cream also and obtains the raw materials from other states but that "so far as the plaintiff is informed the defendant makes no sales or deliveries of its ice cream outside Illinois". The gravamen of the complaint is that sometime in November, 1955, plaintiff and defendant submitted rival bids to the Board of Education of the City of Chicago, for the supply of ice cream for use in the Board's school lunch program, which is subsidized by the Federal Government under the National School Lunch Act; that defendant warned plaintiff that if it should persist in its bid to secure a contract with the Board, defendant would make a concentrated effort to deprive

plaintiff of its customers. The complaint further alleges that the contract was awarded to plaintiff and that thereupon defendant launched a campaign to solicit away most of plaintiff's customers "in the Chicago area", offering loans, air conditioning units, deep freeze units and other items of personal property on condition that plaintiff's customers desert plaintiff and patronize defendant.

In support of its motion to dismiss defendant argues (1) that in order that plaintiff show a right to relief under the Sherman Anti-Trust Act it must show a combination or conspiracy between two or more persons and that where defendant is a single company it is not enough to allege a combination or conspiracy among the employees of such company; (2) that in order that plaintiff show a right to relief under the Clayton and Robinson-Patman Acts it must show that defendant committed the acts complained of "in commerce, in the course of such commerce"; (3) that section 1985(3) of the Civil Rights Act is inapplicable to the facts alleged; and (4) that the National School Lunch Act contains no provisions which would ground a right of action for civil relief.

[1, 2] There is merit in all these contentions. Plaintiff, in its brief, apparently abandons its reliance purely upon the Sherman Anti-Trust Act. It attempts to meet defendant's second contention by reference to this court's decision in *Bowman Dairy Co.* v. *Hedlin Dairy Co.*, 126 F. Supp. 749. In that case, this court, relying upon the decision of the Supreme Court in *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115, 75 S. Ct. 148, 151, 99 L. Ed. 145, held that where plaintiff is engaged "in commerce" but defendant is not, plaintiff should not fail on that account under the Clayton and Robinson-Patman Acts, it having been held in the *Moore* case, involving the converse situation (where defendant acts "in commerce in the course of such commerce" to injure plaintiff who is not engaged "in commerce"), that plaintiff is entitled to relief. This court was led to its conclusion in the *Bowman* case, by consideration of the injustice which would result from holding that the remedies of plaintiff and defendant so situated are not mutual, and of the words of Congressman Utterback, manager of the Robinson-Patman Act in the House, quoted in the opinion of the *Moore* case,

that one of the purposes of the Act was "to protect interstate commerce itself from injury by influences within the State". It may be that where such influence upon the interstate commerce of plaintiff company is alleged, a right of action against a defendant engaged purely in intrastate commerce may be sufficiently stated under the Clayton and Robinson-Patman Acts. This is doubtful in view of the unambiguous language used in both the acts that "it shall be unlawful for any person engaged in commerce, in the course of such commerce, to", etc. However, in this case there is no allegation whatever that plaintiff's interstate business has suffered through defendant's conduct.

[3] Plaintiff advances the eleventh hour argument that defendant is in fact engaged in interstate commerce in that its purchase of raw materials in other states and its manufacture and sale of ice cream in Illinois, constitute an uninterrupted flow of commerce. There are many authorities to the effect that when the raw materials from other states come to rest in defendant's manufacturing plant to await processing, the flow of commerce is interrupted (cf. *Ewing-Von Allmen Dairy Co.* v. *C. and C. Ice Cream Co.*, 6 Cir., 109 F. 2d 898, certiorari denied 312 U. S. 689, 61 S. C. 618, 85, L. Ed. 1126). Defendant points to *United States* v. *Employing Plasterers Ass'n*, 347 U. S. 186, 74 S. Ct. 452, 98 L. Ed. 618, as announcing a different rule. In that case the Supreme Court held that a complaint under the Sherman Anti-Trust Act, alleging a combination by a Chicago trade association of plastering contractors, a local union of plasterers and the union's president, to restrict and control purchase of plastering materials shipped in from other states, could not be properly dismissed on the basis that those materials come to rest before the local restraints become effective. The question whether local restraints upon purchase of materials shipped from other states, not subjected to manufacturing processes on arrival, are restraints upon commerce is not the same as the question whether sale within a state of finished products manufactured within that state from materials shipped from other states, is in commerce or out of commerce. The fact that the materials come to rest upon arrival in the state may indeed be irrelevant to the first question, it is clearly relevant and controlling in the second.

[4] Plaintiff however relies upon its allegation that defendant makes substantial sales to a restaurant chain in Illinois which in turn supplies railroads in interstate commerce. Such sales may place defendant in commerce, if the question were one of federal power to regulate its business (*Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453, 58 S. Ct. 656, 82 L. Ed. 954; *Hamlet Ice Co.* v. *Fleming*, 4 Cir., 127 F. 2d 165). But the Clayton and Robinson-Patman Acts require for their violation that the offending person not only "engaged in commerce" but do the prohibited acts "in the course of such commerce". There is no allegation in plaintiff's complaint that defendant's sales to the restaurant chain supplying railroads involved any acts violative of the Clayton and Robinson-Patman Acts. On the contrary the allegation of plaintiff's complaint is that defendant launched a campaign to solicit away most of plaintiff's customers "in the Chicago area".

[5] Plaintiff cannot be sustained in its reliance upon section 1985(3) of the Civil Rights Act. The history of that section shows that it was not meant to deal with the questions here presented. As section 2 of the Act of April 20, 1871, the full title of which was "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes", it was intended as a solution to pressing problems of civil liberties following upon the Civil War. Apart from its historical context, it has been authoritatively interpreted, in the light of section 1 of the original act (now 42 U. S. C. A. § 1983), as applicable only to combinations or conspiracies "under color of state law" (*Collins* v. *Hardman*, 341 U. S. 651, 71 S. Ct. 937, 939, 95 L. Ed. 1253). It is not alleged here that defendant's acts, in depriving plaintiff of its customers, were done under color of state law.

Plaintiff does not argue with respect to the National School Lunch Act that it has a cause of action arising under that Act, rather it argues that the existence of the Act strengthens its case under the Clayton and Robinson-Patman Acts. Since I hold that plaintiff has failed to state a claim upon which relief may be granted under those Acts, plaintiff's argument here need not be considered.

Defendant's motion to dismiss the complaint is hereby granted. Accordingly the complaint is dismissed.